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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2001

KURT JONES, Warden,
Petitioner,

vs.

OLIVER FRENCH, Jr,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I.

Deprivation of counsel occurs when a court or law *prevents* an accused from having representation. Lead counsel falsely represented that a member of the defense "team" was a lawyer, and failed to appear when directed for a discussion of a note from the jury, instead sending the individual falsely represented as an attorney. Did the state courts unreasonably apply settled federal principles as determined by this Court in concluding that review for prejudice, rather than automatic reversal, was the appropriate course?

II.

A "critical stage" of the trial is one of such significance that the presence of counsel is necessary to insure the adversary process is reliable. Determination whether a portion of the trial process was a "critical stage" thus requires reference to that which occurred. To determine that counsel was absent from a "critical stage" so that prejudice is conclusively presumed without looking to what occurred is to beg the question. Was counsel absent at a critical stage when the judge instructed the jury to "keep on talking"?

III.

To grant relief on habeas corpus the state court decision must have been either contrary to or an unreasonable application of settled federal constitutional principle as determined by this Court. An unreasonable application is more that one believed "incorrect" by the federal court. Given the rejection of the "any rational jurist" test by this Court, should certiorari should be granted to give further guidance, so that federal courts do not simply conclude that

because they disagree with the state courts the state court decision was therefore unreasonable?

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PETITION FOR WRIT OF CERTIORARI
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NOW COMES the State of Michigan, by **MICHAEL E. DUGGAN**, *Prosecuting Attorney for the County of Wayne*, **TIMOTHY A. BAUGHMAN**, *Chief of Research, Training, and Appeals*, and **OLGA AGNELLO**, *Principal Attorney, Appeals*, and prays that a Writ of Certiorari issue to review the judgment of the Sixth Circuit Court of Appeals of the United States of America, entered in this cause on March 8, 2002.

OPINIONS BELOW

The order of the Michigan Supreme Court denying leave to appeal is reported at 459 Mich. 865, 584 N.W.2d 924 (1998). The opinion of the Michigan Court of Appeals is unreported, and is attached as an appendix. The opinion of the District Court is reported at 114 F.Supp.2d 638 (ED Mich, 2000), and is attached as an appendix. The opinion of the Sixth Circuit affirming the District Court order granting the writ is as yet unreported, and is attached as an appendix.

STATEMENT OF JURISDICTION

The Sixth Circuit Court of Appeals issued its opinion on March 8, 2002 This Court's jurisdiction is invoked under 28 USC §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> ....No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Procedural History

On May 3, 1995, the petitioner, Oliver French, was found guilty but mentally ill of one count of first degree premeditated murder, one count of second degree murder, two counts of assault with intent o commit murder and possession of a firearm during the commission of a felony, following a jury trial presided over by the Honorable Margie Braxton. On May 18, 1995, Judge Braxton sentenced the petitioner to a term of life imprisonment without parole, concurrent sentences of fifteen to thirty years for the second degree murder and assault conviction and a consecutive two year term for the felony firearm conviction.

On July 15, 1997, the Michigan Court of Appeals affirmed the petitioner's convictions. On October 9, 1997, the Michigan Court of Appeals denied the petitioner's request for rehearing. On September 22, 1998, the Michigan Supreme Court denied the petitioner leave to appeal.

On October 16, 1998, the petitioner filed in the U. S. District Court a habeas corpus petition. On March 17, 1999, Judge Tarnow heard oral argument. On March 25, 1999, Judge Tarnow issued an Opinion and Order granting the writ.

The respondent appealed Judge Tarnow's decision and the parties argued before the Sixth Circuit Court of Appeals. On July 18, 2000, that Court remanded the case to the district court for resolution of the question of whether Ty Jones was present and represented the petitioner at the time the trial court reinstructed the jury. Judge Tarnow heard testimony on August 31st and September 7th, 2000. Judge Tarnow found that Jones was not an attorney despite lead counsel's representation to the trial court and jury that he was. Finding that the petitioner had been without representation when the trial court reinstructed the jury, Judge Tarnow ruled that a Sixth Amendment violation amounting to structural error had occurred. On September 29, 2000, Judge Tarnow issued an Opinion and Order granting the petition for writ of habeas corpus.

On March 8, 2002, the 6th Circuit Court of Appeals affirmed. Petitioner seeks certiorari.

Facts of the Case

It was not disputed by the parties that Oliver French shot and killed Ronald McTasney and Gregory Couls or that he wounded William Bisbing and David Weitz at the Ford Rouge Plant where he was employed. The issue at trial was the sanity of the petitioner at the time he committed the acts.

On the first day of trial, counsel of record, Cornelius Pitts and Monsey Wilson, seated themselves at the defense table with Ty Jones. The prosecutor, Augustus Hutting, asked who the third person was; Pitts responded that he was an attorney from California who specialized in jury selection. Hutting recommended that Pitts get clearance from the trial court to have Jones at the table. Pitts, Jones, and Hutting approached the bench and Pitts repeated to the trial court his introduction of Jones as an attorney from California, there to assist during the trial. After Pitt's representation, the trial court permitted Jones to remain at the defense table. (R 67, T. 9/7/00, 4-5, Apx. 199-200). During the course of jury selection, Mr. Pitts introduced Jones to the jury as counsel from California:

> MR. PITTS: May it please the Court. I am Cornelius Pitts, and I am aided in the representation of Mr. French with Mr. Monsey Wilson.
>
> MR. WILSON: Good afternoon.
>
> MR. PITTS: We likewise have one additional, a Mr. Ty Jones, who is indeed a counsel from California, who is aiding and assisting us temporarily here.

(R 45, T. 3/29/95, 7-8, Apx 163-164). Jones was present every day of trial at the defense table and did address the trial court at the behest of lead counsel concerning an incident with a witness. (R 42, T. 4/26/95, 138-140, Apx. 165-167).

On April 27, 1995, after giving its instructions, the trial court asked the jury to retire to the jury room solely for the purpose of selecting its foreperson. Ten minutes later, the trial court excused the jury for the day. No deliberation occurred that day. (R 1, T. 4/27/95, 3, Apx. 59).

On Friday, April 28th at 9:00 a.m. the jury resumed deliberations. At 10:25 on Friday morning, the jury sent out a note requesting definitions, reports and transcript. The trial court, prosecutor and defense counsel (Wilson) discussed a response to the note and the trial court instructed the jury again from 10:56 a.m. to 11:15 a.m. (R 1, T. 4/28/95, 4-18, Apx. 60-74). The jury sent out another note requesting copies of specific instructions which defense counsel (Wilson) and the prosecutor agreed the trial court should send into the jury room. (R 1, T. 4/28/95, 18-19, Apx 74-75). At 3:25 p.m. the jury sent out another note to which the trial court did not immediately respond. Instead, the trial court excused the jury for the week-end. (R 1, T. 4/28/95, 19-20, Apx 75-76).

On Monday, May 1, 1995, in the presence of defense counsel (Pitts) and the prosecutor, the trial court read the note sent out by the jury after only a few hours of deliberation at 2:58 on the previous Friday afternoon: "We can't reach a unanimous decision. Our minds are set." The trial court stated it would read the deadlocked jury instruction to which the prosecutor agreed. Defense counsel stated a mistrial would be appropriate. The trial court read to the jury the standard instruction at 9:30 a.m. After lunch the jury sent out another note. At 3:37 p.m. the jury was excused for the day. (R 1, T. 5/1/95, 21-26, Apx. 77-82).

On Tuesday, May 2, 1995, at 9:30 a.m., the trial court read the jury note for the record: "We have followed your instructions. We are still unable to reach a decision." The trial court told the jury it would supply any exhibits requested and asked the jury to continue deliberations. (R 1, T. 5/2/95, 27, Apx 83). The jury sent out another note at 11:00 a.m.: "We are not able to reach a verdict. We are <u>not</u> going to reach a verdict." The trial court did not immediately respond. Instead, it sent the jury to lunch and instructed the parties to appear at 2:00 p. m.. At 2:07 p.m. in the presence of the prosecutor and Ty Jones, the trial court told the jury the trial had been a lengthy one and it had been deliberating for only two days. The trial court reminded the jurors that they were expected to communicate with one another and exchange

ideas in order to reach a verdict. At 3:30 p.m. the jury was excused for the day. (R 1, T. 5/2/95, 27-28A, Apx 83-85).

On Wednesday, May 3, 1995, Cornelius Pitts, defense counsel, requested a mistrial. Mr. Pitts conceded that four days (the jury had actually deliberated for three *short* days) was not an excessive period of deliberation for such a long trial, but argued the language of the three notes sent out by the jury indicated it could not agree. During the course of his argument, Mr. Pitts never mentioned that his client had been unrepresented when the trial court instructed the jurors to talk to one another. Mr. Pitts focused upon the language of the juror notes and finally made a request of the court:

> MR. PITTS: So I would respectfully ask the Court. We can do this. You can have the jury come out here. You can ask that Foreperson, listen, you have had these various notes at various times. Let me just ask you practically. I don't have any problem with it. You think sitting in there another half day is going to make things any different, or do you think coming back tomorrow is going to make a difference.

(R 1, T. 5/3/95, 37, Apx. 94). In the middle of the trial court's response, the jury returned a verdict.

At the evidentiary hearing presided over by Judge Tarnow, Ty Jones stated he was not an attorney and that he never told Cornelius Pitts that he was an attorney. (R 68, T. 8/31/00, 8, 12, Apx. 210, 214). Pitts admitted that he introduced Jones as counsel from California because he wanted to convey the impression that it was a big team defending the petitioner. (R 68, T. 8/31/00, 33-35 Apx. 235-237).

REASONS FOR GRANTING THE WRIT

I.

Deprivation of counsel occurs when a court or law *prevents* an accused from having representation. Lead counsel falsely represented that a member of the defense "team" was a lawyer, and failed to appear when directed for a discussion of a note from the jury, instead sending the individual falsely represented as an attorney. The state courts did not unreasonably apply settled federal principles as determined by this Court in concluding that review for prejudice, rather than automatic reversal, was the appropriate course.

The Sixth Circuit Court of Appeals persists in finding in *United States v Cronic*[1] a rule of *per se* prejudice and automatic reversal.[2] And at least one other circuit has followed suit.[3] The "rule" is not anchored in the facts or holding of *Cronic*; it resides in a line of dicta.[4] By describing

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[1] *United States v Cronic*, 466 US 648, 104 Sct 2039, 80 LEd2d 657 (1984).

[2] *Mitchell v Mason*, 257 F3d 554 (CA 6 2001), (petition for certiorari pending) it presumed prejudice because trial counsel had been suspended from the bar for 30 days prior to trial; *Hunt v Mitchell*, 261 F3d 575 (CA 6 2001), presumed prejudice because counsel was appointed on the first day of trial even though there had been a ten-day continuance after presentation of the prosecution's first witness.

[3] In *Burdine v Johnson*, 262 F3d 336 (CA 5 2001), (petition for certiorari pending) the Fifth Circuit held that the Sixth Amendment required a presumption of prejudice when trial counsel slept during portions of the trial.

[4] "The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial." *Cronic*, 80 L Ed2d at 668.

the naked principle as Supreme Court authority, the Sixth Circuit has relieved itself of the constraints of fact-bound holdings and, thus, paying false deference to the review standard of the AEDPA, it has freed itself of that limitation.

So when the Sixth Circuit found that the Michigan appellate court was unreasonable in looking to the fact paradigm of *Rushen v Spain* [5] and applying harmless error analysis, it merely trumped with *Cronic*. It ignored *Williams v Taylor*, [6] the case that clarified the meaning of the operative clauses in §2254(d)(1). The *Williams* Court expressly limited the "clearly established Federal Law" phrase: "That statutory phrase refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision."[7] But the Sixth Circuit found the holding of *Rushen v Spain*, permitting harmless error analysis in the circumstance of an ex parte communication by a trial court with a single juror, could not be extrapolated to the facts of this case – an ex parte communication by the trial court with all twelve jurors. The dicta of *Cronic* holds more charm for the Sixth Circuit. This Court must stop what is becoming an annihilation of the concept of deprivation of counsel.

A. Deprivation of counsel

In the Michigan Court of Appeals, the respondent claimed he was denied his Sixth Amendment right to counsel because neither lead counsel, Cornelius Pitts, nor his second chair, Monsey Wilson, were present at the time the trial court responded to a jury note. Ty Jones, the person Pitts introduced

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[5] *Rushen v Spain*, 464 US 114, 104 SCt 453, 78 LEd2d 267 (1983).

[6] *Williams v Taylor*, 529 US 362, 120 SCt 1495, 146 LEd2d 389 (2000).

[7] 146 LEd2d at 429.

as "counsel from California,"[8] did return at the appointed time and took his place at the defense table. Jones, unbeknownst to the trial court, was not an attorney at all. Despite the fact that the trial court did nothing to prevent trial counsel's presence and in fact did not know that Jones was not an attorney, the Sixth Circuit found the trial court's brief remarks to the jury to be structural error.

The Sixth Circuit's ruling that the "error" was structural is mistaken. "Structural error is an error affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself."[9] The distinction between "structural error" and "trial error" is an important one because it determines how review should proceed; structural error renders an entire trial inherently unfair because prejudice is incapable of measure and, therefore, warrants automatic reversal, while trial error requires analysis to determine the extent of its impact in the circumstances – whether it was harmless. Sixth Amendment violations which amount to structural error include the *total deprivation* of the right to counsel;[10] a trial court's order preventing a defendant from consulting with his attorney at all during a recess between his direct and cross-examination;[11] the trial court's refusal to

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[8] Pitts testified at the district court evidentiary hearing that he introduced Jones to the trial court, prosecutor, and the jury as an attorney because he wanted to convey the impression that the respondent had a "team" working for him. R 68; 8/31/00, 33-34.

[9] *Arizona v Fulminante*, 499 US 279, 310, 111 SCt 1246, 113 LEd2d 302 (1991).

[10] *Gideon v Wainwright*, 372 US 335, 83 Sct 792, 9 LEd2d 799 (1963).

[11] *Geders v United States*, 425 US 80, 96 Sct 1330, 47 LED2d 592 (1976).

allow counsel to be heard in summation of the evidence;[12] a statute requiring a defendant to testify before any other defense evidence was presented deprived the defendant of the advice of counsel in making the decision;[13] the denial of counsel at arraignment, the stage at which insanity must be pleaded or the defense forfeited;[14] the denial of counsel at a preliminary hearing where a plea was entered,[15] a statute permitting the admission only of the defendant's unsworn statement and the denial of the right to have counsel examine the defendant regarding it;[16] the refusal to appoint counsel before entry of the defendant's plea.[17] In all of these cases, this Court implicitly accepted common usage of the word "deprive"[18] and held that when a court or law, in other words, the government, keeps counsel from the accused, it amounts to a Sixth Amendment "deprivation." Only when a defendant was actually deprived of the advice or representation of counsel at a stage when it was necessary to the defense, did this Court find structural error which required automatic reversal.

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[12] *Herring v New York*, 422 US 853, 95 Sct 2550, 45 Led2d 593 (1975).

[13] *Brooks v Tennessee*, 406 US 605, 92 SCt 1891, 32 LEd2d 358 (1972).

[14] *Hamilton v State of Alabama*, 368 US 52, 82 SCt 157, 7 LEd2d 114 (1961).

[15] *White v Maryland*, 373 US 59, 83 SCt 1050, 10 LEd2d 193 (1963).

[16] *Ferguson v Georgia*, 365 US 570, 81 SCt 756, 5 LEd2d 783 (1961).

[17] *Williams v Kaiser*, 323 US 471, 65 SCt 363, 89 Led 398 (1945).

[18] defined in Webster's Third New International Dictionary 606 (1965) as to take away, to remove, to keep from possession and enjoyment

Cronic did not involve structural error. The language of *Cronic*, extracted by the Sixth Circuit to support its position – "The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial." – was not *Cronic's* holding. It was merely dicta offered by the court in its survey of Sixth Amendment law, explaining the continuum of the of analysis. That is not to say that the dictum is not an accurate statement of the law; it is, as it reflects the holdings of the *deprivation* cases. But it is not applicable to this case as this is not a case of *deprivation*. Because *Cronic* involves facts far removed from those of this case, *Williams* teaches that it cannot be the controlling precedent for resolution of the question presented here.

B. Jury communication/ ineffective assistance

In this case, it cannot be said that the trial court in any way took away, removed, or kept counsel from advising the petitioner. Without such an act by the trial court, counsel's absence cannot be characterized as a *deprivation*; it does not fall within any of the fact paradigms of the Supreme Court cases that define a Sixth Amendment deprivation. But the trial court's action does resemble that of the trial court in *Rushen v Spain*, where the trial judge twice spoke to a juror about her concerns about evidence she had heard; the judge mollified her and told how to conduct herself. Neither defense counsel nor the prosecutor learned of these *ex parte* communications until after the trial.

This Court found that the communication between the judge and juror was innocuous; they did not discuss any fact in controversy or any law applicable to the case. The Court held that the right to be present and to be represented by counsel during all critical stages of trial are subject to harmless error analysis.

Spain is a good fit for this case. The trial court in this

case like the trial court in *Spain*, was not responsible for the fact that counsel was not present during its communication to the jury.- That is, neither trial court prevented counsel's presence. In fact in this case, the trial court believed that Jones, who was sitting at the defense table, *was* an attorney and had been misled into so thinking by lead defense counsel. In this case, as in *Spain*, the trial court had an innocuous communication with the jury. The similarity of these cases is significant enough to warrant application of the same harmless error analysis. The Sixth Circuit was wrong in finding the Michigan Court of Appeals reliance on *Spain* to be unreasonable. Offering no analysis of the state appellate court's "perversity," the Sixth Circuit merely disagreed.

But a second avenue of analysis is also available in this case – ineffective assistance of counsel. Here, respondent's lead counsel, Pitts, had the audacity to lie to the court and jury in introducing Jones as an attorney, there to "help." This outrageous behavior and its consequence warrants evaluation. And this "mistake" was compounded by Wilson's failure to return to the courtroom as directed. This defense performance was culpable, can easily satisfy the first prong of the ineffective assistance test. But did it prejudice the petitioner? Because the trial court's remarks to the jury were innocuous, not at all coercive, the communication was harmless.

II.

A "critical stage" of the trial is one of such significance that the presence of counsel is necessary to insure the adversary process is reliable. Determination whether a portion of the trial process was a "critical stage" thus requires reference to that which occurred. To determine that counsel was absent from a "critical stage" so that prejudice is conclusively presumed without looking to what occurred is to beg the question. Counsel was not absent at a critical stage – the judge merely instructed the jury to "keep on talking."

The Sixth Circuit has found that the absence of counsel–or put another way, the presence of an individual the trial court was mislead by the defense to believe was an attorney for the respondent–when the jury was given an instruction in response to a note, to require the setting aside of the conviction without any inquiry into prejudice because the proceeding was a "critical stage." This begs the question, for it is precisely that which occurred during any portion of the proceedings that determines whether that portion was a critical stage of the proceedings. The prejudice inquiry is inseparable, at least in many cases, from the question of whether a critical stage was involved when counsel was absent.

The point is illustrated by *United States v Russell*.[19] The defendant was one of 17 on trial. During trial his attorney collapsed in the lobby outside the courtroom, and was hospitalized. The trial continued, and the trial judge instructed the government that it was not to call any witnesses relevant to Russell until his attorney recovered and returned

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[19] *United States v Russell*, 205 F3d 768 (CA 5, 2000)

to the courtroom. Russell's counsel was absent from the trial for two days. Though no testimony directly implicating Russell was presented, eighteen witnesses, and a number of exhibits, were presented. Some of the evidence arguably incriminated Russell in the conspiracy indirectly.

The Fifth Circuit declined to adopt a bright line rule that the taking of any evidence in the absence of counsel is prejudicial *per se*, finding no such rule required by this Court's decision in *Cronic*. Rather, said the court, each case must be examined to determine whether the accused was denied counsel at a critical stage. Identifying critical stages the court found to be a difficult task, but identified several factors, set out in *Cronic*, especially that "there must be a denial of such significance that it makes the adversary process unreliable."[20] Because evidence was received that built the conspiracy case against all conspirators, thereby inferentially "increasing the taint of guilt" of Russell, the court found that counsel had been absent at a critical stage, and no further showing of prejudice was required.

Similarly, in *Olden v United States*[21] defendant's counsel was absent when evidence "probative of defendant's culpability" was received. The court found that the portions of the trial where counsel was absent were therefore "sufficiently critical to the ultimate question of guilt" to be critical stages, so that no further showing of prejudice was required.

On the other hand, in a case closely analogous to the present case, the Eleventh Circuit found that presuming prejudice was inappropriate. In *United States v Rapp*[22] the

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[20] 205 F3d at 771.

[21] *Olden v United States*, 224 F3d 561 (CA 6, 2000).

[22] *United States v Rapp*, 871 F2d 957 (CA 11, 1989).

trial judge responded to a note from the jury without consulting counsel and in their absence. The note indicated that the jury had reached a verdict against some defendant's but could not do so as to others, and requested guidance as to what to do. The judge assembled the jury in an anteroom, and gave a modified *Allen* charge in the absence of counsel. Citing *Rushen v Spain*[23]–the case relied upon by the petitioner in the present case, and cited by the Michigan Court of Appeals, but which the panel found "unreasonably applied"–the court examined whether the error of the court in so proceeding was harmless. The court found not, looking to the content of the instruction given by the trial judge.

The panel also noted that the situation was not unique, cataloguing cases where a trial court had answered substantive legal questions from the jury without counsel being present.[24] As the panel observed, "[N]one of the convictions was reversed...because each error was harmless." The court reached the same conclusion, stating that the fact that an *Allen* charge was involved was "not a factual difference that renders the communication prejudicial *per se*. Instead, some prejudice must be shown to have resulted from this error."[25] Finding no prejudice from the instruction–which, as in the present case, the court was able to review, being on the record–the court affirmed.

Finally, in *Vines v United States*[26] the panel found that the absence of defendant's counsel when testimony was taken

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[23] *Rushen v Spain*, 464 US 114, 104 S Ct 453, 78 L Ed 2d 267 (1983).

[24] See 871 F2d at 966-967.

[25] 871 F2d at 967.

[26] *Vines v United States*, 28 F3d 1123 (CA 11, 1994).

that was not incriminatory of the defendant was subject to a review for prejudice.

Rushen v Spain, cited by the Michigan Court of Appeals, is the appropriate template here. The panel's assertion that the contact between the judge and a juror in that case was "incidental" is remarkable–the judge met alone with a juror in chambers, and, in response to her concerns regarding contacts, told her how to compart herself, all in the absence of counsel. And this did not occur on the record, providing for easy review of what occurred. This Court found the hearing held post-trial sufficient to show that the communication was not prejudicial; yet, with a record of the instruction given here, the panel nonetheless insists that the state court erred–and not only erred, but acted *unreasonably* in erring, a conclusion reached with no analysis whatsoever–in reviewing for prejudice at all.

This Court should grant certiorari on this question, and hold that a review of what occurred during counsel's absence is part and parcel of determining whether counsel was absent during a critical stage–one "of such significance that it makes the adversary process unreliable."[27]

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[27] The panel, as an aside, also noted here that the trial judge's instruction allegedly "significantly deviated" from the model Michigan instruction, and therefore "likely" had a "substantial and injurious effect." The panel took no note of the fact that this question is one of state, and not federal law, and did not mention–even in passing–that the Michigan Court of Appeals made a specific finding to the contrary, finding the instruction not prejudicial under Michigan law. See Michigan Court of Appeals decision. Appendix C.

III.

To grant relief on habeas corpus the state court decision must have been either contrary to or an unreasonable application of settled federal constitutional principle as determined by this Court. An unreasonable application is more that one believed "incorrect" by the federal court. Given the rejection of the "any rational jurist" test by this Court, certiorari should be granted to give further guidance, so that federal courts do not simply conclude that because they disagree with the state courts the state court decision was therefore unreasonable.

In *Williams v Taylor*[28] this Court rejected the view of some circuits that the state court application of settled federal constitutional principles as determined by this Court can only be unreasonable if the state court "has applied federal law in a manner that reasonable jurists would all agree is unreasonable." Instead, said this Court, the reviewing court should simply determine whether the state court acted unreasonably, bearing in mind that "the most important point is that an *unreasonable* application of federal law is different from an *incorrect* application of federal law." In other words, "a federal habeas court may not grant relief simply because it concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable."

The decision of the panel here is symptomatic of a growing trend since *Taylor*. The panel believed that the state court erred in turning to *Rushen v Spain* to find review for

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[28] *Williams v Taylor*, 529 US 362, 120 S Ct 1495, 146 L Ed 2d 389 (2000).

prejudice appropriate. Even if the panel is correct–and petitioner firmly believes it is not–the panel, because it disagreed with the state court, simply concluded that because it viewed the state court as wrong, *ipso facto* the state court had acted unreasonably.[29]

Petitioner submits that this case demonstrates that further guidance from this Court is needed as to the application of the "unreasonable" requirement of the federal statute. Petitioner suggests that if the state court decision–even if viewed as wrong as an independent matter by the habeas court–is within the range of "plausible outcomes," the writ must be denied. Or, petitioner submits, reconsideration of rejection of the "any rational jurist" test might be appropriate, particularly in light of this Court statement of the test for a certificate of appealability as whether "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right."[30]

Consideration of this important question warrants the attention of this Court.

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[29] See slip opinion, at page 6.

[30] *Slack v McDaniel*, 529 US 473, 120 S Ct 1595, 146 L Ed 2d 462 (2000).

RELIEF

WHEREFORE, this Court should grant certiorari in this matter.

MICHAEL E. DUGGAN
Wayne County
Prosecuting Attorney

****TIMOTHY A. BAUGHMAN***
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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION

Pursuant to Sixth Circuit Rule 206

ELECTRONIC CITATION: 2002 FED App. 0082P (6th Cir.)

File Name: 02a0082p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Oliver French, Jr.

Petitioner-Appellee,

v. No. 00-2308

Kurt Jones,

Respondent-Appellant.

Appeal from the United States District Court

for the Eastern District of Michigan at Detroit.

No. 98-74520--Arthur J. Tarnow, District Judge.

Argued: January 22, 2002

Decided and Filed: March 8, 2002

Before: JONES and COLE, Circuit Judges; GWIN, District Judge.(*

COUNSEL

ARGUED: Olga Agnello, OFFICE OF THE PROSECUTING ATTORNEY, COUNTY OF WAYNE, Detroit, Michigan, for Appellant. David A. Moran, STATE APPELLATE DEFENDER OFFICE, Detroit, Michigan, for Appellee. **ON BRIEF:** Olga Agnello, OFFICE OF THE PROSECUTING ATTORNEY, COUNTY OF WAYNE, Detroit, Michigan, for Appellant. David A. Moran, STATE APPELLATE DEFENDER OFFICE, Detroit, Michigan, for Appellee.

OPINION

GWIN, District Judge. This case returns to us for a second time. With this appeal we examine whether the district court wrongly granted a writ of habeas corpus after a Michigan court gave a supplemental instruction to a deadlocked jury. The Michigan trial judge gave the supplemental instruction, which did not conform with the approved Michigan instruction, when the defendant's attorney was not present.

At the earlier appeal to this Court, we vacated the district court's order granting habeas relief and remanded the case for an evidentiary hearing. At that hearing, the district court was directed to review the role of Ty Jones(1), an alleged attorney from California. Ty Jones was present at the time the supplemental instruction was given but it was unclear whether he was licensed to practice law. *French v. Jones*, No. 99-1436, 2000 WL 1033021, at *1-2 (6th Cir. July 18, 2000).

At the ensuing evidentiary hearing, the district court learned Jones was not an attorney and was present only to observe Cornelius Pitts, one of French's attorneys. After

finding that Ty Jones was not an attorney, the district court held that French was denied representation during a critical stage of his trial and granted his petition for a writ of habeas corpus. *French v. Jones*, 114 F. Supp. 2d 638, 643 (E.D. Mich. 2000).

With this appeal, we decide whether a defendant whose lawyer was not present when the trial judge gave a supplemental instruction to a deadlocked jury is entitled to habeas relief. Finding Petitioner French was denied counsel during a critical stage of his trial, we affirm the district court's grant of a writ of habeas corpus.

I.

On September 10, 1994, French shot four fellow union officials at the Ford Motor Company Rouge facility in Dearborn, Michigan. After trial to a jury,(2) French was found guilty but mentally ill(3) of one count of first-degree murder, Mich. Comp. Laws §§ 750.316, one count of second-degree murder, Mich. Comp. Laws §§ 750.317, two counts of assault with intent to commit murder, Mich. Comp. Laws §§ 750.83, and one count of possession of a firearm during the commission of a felony, Mich. Comp. Laws §§ 750.227b. The Michigan trial court sentenced French to life imprisonment without parole for the first-degree murder conviction, fifteen to thirty years imprisonment for the each of the second-degree murder and assault with intent to murder convictions, and two years consecutive imprisonment for the firearm conviction. At trial, two attorneys, Cornelius Pitts and Monsey Wilson, represented French. Ty Jones was also present at defense counsel's table for portions of the trial.

The confusion surrounding this case stems from representations made by Pitts and Wilson. At the beginning of the trial, Pitts introduced Jones to the prosecutor and trial judge as an attorney from California who specialized in

jury selection. Pitts said Jones was present to assist with the trial. Based on Pitts's representation, the trial judge allowed Jones to remain at the defense table.

During jury selection, Pitts introduced Jones as "counsel from California" who was assisting with the trial. Jones was present at the defense table every day of trial but never spoke in the presence of the jury.

At the evidentiary hearing held in this matter, the district court learned Jones was not a licensed attorney. While he had attended one year of law school at New York University, Jones worked as a motion picture consultant and screenwriter in Los Angeles. Jones observed the trial as background for the development of a television series based on the Detroit legal system.

At the evidentiary hearing, Pitts testified that Jones told him that he was a lawyer. Although Pitts did not intend for Jones to participate in the trial, Pitts said he introduced Jones as "counsel from California" to give the impression of a large defense team.

French's trial took more than two weeks before being submitted to the jury. After receiving their instructions and choosing a foreperson, the jury recessed on Thursday, April 27, 1995. The jury reconvened and began deliberating the morning of Friday, April 28, 1995. During that day, the jury twice requested copies of trial materials. On both occasions, the prosecutor, Wilson, and the trial judge discussed the notes and sent the requested materials to the jury.

Late on Friday afternoon, the jury sent out a third note to which the trial judge did not immediately respond. Instead, the trial judge recessed the trial and excused the jury for the weekend.

On the morning of Monday, May 1, 1995, the trial judge

read the note to Pitts and the prosecutor: "We can't reach a unanimous decision. Our minds are set." Pitts requested a mistrial, but the trial judge read the jury Michigan's standard deadlocked jury instruction. The jury continued to deliberate until late afternoon, when they sent out a second note. The second note also said the jury was unable to reach a decision. The trial judge again recessed the trial and excused the jury for the day.

At 9:30 a.m. on May 2, 1995, the trial judge again instructed the jury and directed them to continue deliberations. After continuing deliberations, the jury sent out a third note at 11:00 a.m.: "We are not able to reach a verdict. We are *not* going to reach a verdict." The trial judge responded by sending the jury to lunch and instructing the parties to appear at 2:00 p.m.

At 2:00 p.m., neither Pitts nor Wilson had returned to the courtroom. The trial judge asked Jones, who was present, to contact the two attorneys. Jones was unable to contact Pitts or Wilson. At 2:07 p.m., without Pitts or Wilson present, the trial judge brought the jury in and gave them a supplemental jury instruction. Unlike the first two instructions, the third instruction was not the standard deadlocked jury instruction.(4) The trial judge dismissed the jury for the day approximately one hour after giving the supplemental instruction.

The next morning, Pitts requested a mistrial because he felt the trial judge's supplemental instruction was coercive. While Pitts was arguing for a mistrial, the jury returned its verdict.

French moved the Michigan trial court to order a new trial, arguing he was prejudiced because his attorneys had not been present during the third supplemental jury instruction. The trial judge noted French's argument had some merit, but denied the motion for a new trial.

On July 15, 1997, the Michigan Court of Appeals affirmed the petitioner's convictions. The court held that the absence of defense counsel during a critical stage of the trial was subject to harmless error analysis. The court of appeals found the error harmless in French's case. On September 22, 1998, the Michigan Supreme Court denied the petitioner leave to appeal.

On October 16, 1998, the petitioner filed a petition in federal court for a writ of habeas corpus. On March 25, 1999, the district court granted the writ. As discussed above, the warden appealed, and we vacated the district court's decision and remanded for an evidentiary hearing.

Now, with a fully developed record before us, we review the district court's decision to grant French's petition for a writ of habeas corpus. As grounds for the writ, French argues that the Michigan trial judge denied his constitutional right to the assistance of counsel when it supplemented its instruction to the jury when neither of his attorneys were present.

II.

We review a district court's grant of habeas relief de novo. *See, e.g., Harpster v. Ohio,* 128 F.3d 322, 326 (6th Cir. 1997).

In determining whether to issue a habeas writ, the district court's review of a state court decision is governed by the standards set forth in the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. §§ 2241 et seq. ("AEDPA").(5) *Id.* The AEDPA only provides habeas relief for a state prisoner in certain circumstances:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with

> respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. §§ 2254(d) (2001).

The question of whether the trial judge deprived French of his right to counsel during the supplemental jury instruction is a mixed question of law and fact. *See Strickland v. Washington*, 466 U.S. 668, 698 (1984). In a habeas case, we apply the "unreasonable application" prong of §§ 2254(d)(1) to a mixed question of law and fact. *See* 28 U.S.C. §§ 2254(d)(1); *Harpster*, 128 F.3d at 326-27.

The recent Supreme Court decision of *Williams v. Taylor*, 529 U.S. 362 (2000), clarified the meaning of the operative clauses in §§2254(d)(1). *Williams* stated that federal courts are to find "clearly established Federal law" in the holdings of the Supreme Court, as opposed to its dicta, at the time of the relevant state court decision. *Williams*, 529 U.S. at 412; *see also Harris v. Stovall*, 212 F.3d 940, 944 (6th Cir. 2000).

Williams then went on to clarify the situations in which a court could grant a writ of habeas corpus under §§ 2254(d)(1):

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a

> conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams, 529 U.S. at 412-13. Therefore, we look to see if the Michigan courts have unreasonably applied a governing legal principle identified by the Supreme Court when they applied harmless error analysis to French's deprivation of counsel during the supplemental instruction.

A.

Both parties agree that "the complete denial of counsel during a critical stage of a judicial proceeding mandates a presumption of prejudice." *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000); *see also United States v. Cronic*, 466 U.S. 648, 659 n.25 (1984). In our order remanding this case to the district court for an evidentiary hearing, we agreed with the district court that a supplemental jury instruction is a "critical stage" of a criminal proceeding. *French*, 2000 WL 1033021, at *3 (citing *Rogers v. United States*, 422 U.S. 35 (1975), and *Shields v. United States*, 273 U.S. 583 (1927)); *see also Curtis v. Duval*, 124 F.3d 1, 4 (1st Cir. 1997). In our previous decision in this matter, we noted that the Michigan courts conceded that the supplemental instruction was a critical stage of the trial. *See French*, 2000 WL 1033021, at *3 n.5. In light of our holding, we remanded the case to determine the exact nature of Jones's participation at the trial.

Once the evidentiary hearing established Jones was not an attorney, French argued the Supreme Court has "uniformly

found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *Cronic*, 466 U.S. at 659 n.25. Since the supplemental jury instruction was a critical stage of the trial, French said reversal should be automatic. The district court agreed with French. Citing *Cronic*, the district court found a structural defect like the deprivation of counsel during a critical stage of the trial required automatic reversal. *See French*, 114 F. Supp. 2d at 642.

Michigan argues the district court erred when it found French's lack of counsel during the supplemental instruction to be a structural error. Instead, the appellant says French's lack of counsel during the supplemental instruction was a trial error, subject to harmless error analysis.

In support of his position, the appellant says previous Supreme Court decisions indicate that an error during trial only requires automatic reversal when a defendant has suffered a total deprivation of counsel.(6) The appellant says the present case does not involve the complete deprivation of counsel because the trial court's actions did not prevent counsel from advising French. Without such an act by the trial court, the appellant says French's lack of counsel during the supplemental instruction is not a deprivation because it does not fall within any of the fact paradigms the Supreme Court describes as deprivations under the Sixth Amendment.

As further support for its position that the district court erred, the appellant argues the district court's reliance on *Cronic* is misplaced. In *Cronic*, the Court reversed the court of appeals' inference that a defendant had received ineffective assistance of counsel because of the attorney's inexperience, limited access to witnesses, and short time to investigate and prepare for a complex trial. *Cronic*, 466

U.S. at 666. The Court remanded the case to consider whether specific alleged errors made by defense counsel were sufficient to support an ineffective assistance of counsel claim. *Id.* at 666-67. The appellant acknowledges *Cronic*'s statement in dicta that "[t]he presumption that counsel's assistance is essential requires [a court] to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial" is an accurate statement of law. *Id.* at 659. Because *Williams* instructs courts to rely only on the holding of cases when deciding clearly established federal law for habeas petition purposes, *Williams*, 529 U.S. at 412, the appellant says the district court should not have relied on this statement of law because the language was not applicable to *Cronic*'s ultimate holding.

Instead, the appellant says the facts of this case resemble those in *Rushen v. Spain*, 464 U.S. 114 (1983). In *Rushen*, the Court applied harmless error analysis to a trial judge's ex parte communications with a juror about the juror's personal interaction with a police informant currently testifying before the juror. *Rushen*, 464 U.S. at 120-21. Neither defense counsel nor the prosecutor learned of the ex parte communications until after the trial.

The *Rushen* Court found that the post-trial hearing held on the matter provided sufficient evidence the communication between the judge and juror was innocuous and that no bias infected the jury's deliberations. *Id.* The appellant says the Court's use of harmless analysis in *Rushen* supports his assertion that we should analyze the present case for harmless error.

We disagree. Despite the appellant's attempt to characterize *Cronic*'s language as dicta, the Court has often held, both before and after *Cronic*, that absence of counsel during a critical stage of a trial is per se reversible error. Six years before *Cronic*, the Court held in *Holloway v. Arkansas*, 435

U.S. 475 (1978), that "when a defendant is deprived of the presence and assistance of his attorney, either throughout the prosecution or during a critical stage in, at least, the prosecution of a capital offense, reversal is automatic." *Holloway*, 435 U.S. at 489 (citing *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963), and *White v. Maryland*, 373 U.S. 59, 60 (1963)). Four years after *Cronic*, the Court reiterated that harmless error analysis does not apply to Sixth Amendment claims involving the absence of counsel at a critical stage by stating that "the right to counsel is 'so basic to a fair trial that [its] infraction can never be treated as harmless error.'" *Penson v. Ohio*, 488 U.S. 75, 88 (1988) (quoting *Chapman v. California*, 388 U.S. 18, 23 (1967)). As the Court most recently stated in a habeas case, "[t]he existence of [structural] defects-deprivation of the right to counsel, for example-requires automatic reversal of the conviction because they infect the entire trial process." *Brecht v. Abrahamson*, 507 U.S. 619, 629-30 (1993).

Furthermore, the appellant wrongly characterizes *Rushen*. In *Rushen*, the Court did not say harmless error analysis applies to every occurrence of attorney absence at a critical stage of trial. Instead, the Court held that ex parte communications between a judge and juror should be analyzed for harmless error because "'it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote.'" *Rushen*, 464 U.S. at 118-19 (quoting *Smith v. Phillips*, 455 U.S. 209, 217 (1982)).

The present case is vastly different from the incidental contact between a judge and juror at issue in *Rushen*. In this case, the trial judge delivered a supplemental instruction to a deadlocked jury. French's attorneys did not have an opportunity to respond to the jury's note nor were they present when the trial judge gave the supplemental instruction. The uncertainty of the prejudice French

suffered because he was not represented by counsel during this critical stage of his trial makes the outcome of his trial unreliable. *See Roe*, 528 U.S. at 483; *Cronic*, 466 U.S. at 659 n.25.

Cronic correctly summarizes federal law when it states that absence of counsel during a critical stage of a trial amounts to constitutional error. *Cronic*, 466 U.S. at 659 n.25. In light of clear federal law, the Michigan courts unreasonably applied harmless error analysis to French's deprivation of counsel during the supplemental instruction. The district court properly granted the writ of habeas corpus.

B.

We also note that the trial judge's supplemental instruction significantly deviated from the model Michigan instruction and likely had a substantial and injurious influence on the jury's verdict. *See Barker v. Yukins*, 199 F.3d 867, 872-73 (6th Cir. 1999) (holding the petitioner met §§ 2254(d)(1)'s "unreasonable application" standard by showing the trial court's failure to give a proper jury instruction had a substantial and injurious effect on the jury's verdict). In *Sullivan v. People*, 392 Mich. 324, 220 N.W.2d 441 (1974), Michigan adopted the American Bar Association's ("ABA") standard jury instruction 5.4 for addressing a deadlocked jury. *Sullivan*, 392 Mich. at 341-42, 220 N.W.2d at 450.(7) Michigan adopted the ABA's standard instruction to minimize any coercive effect of jury instructions given pursuant to *Allen v. United States*, 164 U.S. 492 (1896). At the time of French's trial, ABA standard jury instruction 5.4 read:

> a) Before the jury retires for deliberation, the court may give an instruction which informs the jury:
>
> (i) that in order to return a verdict, each juror must agree thereto:

(ii) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;

(iii) that each juror must decide the case for himself or herself but only after an impartial consideration of the evidence with the other jurors;

(iv) that in the course of deliberations, a juror should not hesitate to reexamine his or her own views and change an opinion if the juror is convinced it is erroneous; and

(v) that no juror should surrender his or her honest conviction as to the weight or effect of the evidence solely because of the opinion of the other jurors, or for the mere purpose of returning a verdict.

(b) If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as provided in paragraph (a). The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

(c) The jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement.

People v. Pollick, 448 Mich. 376, 381-82, 531 N.W.2d 159, 162 (1995).

The trial judge's supplemental instruction did not remind jurors they should not give up their honest convictions solely because of the opinion of the other jurors or in order to reach a verdict. (J.A. at 84-85). Excluding this aspect of an *Allen* instruction increases its coercive effect. *See United*

States v. Burgos, 55 F.3d 933, 939-40 (4th Cir. 1995); *Jiminez v. Myers*, 40 F.3d 976, 981 n.5 (9th Cir. 1993) ("A trial court's failure to give such a cautionary instruction weighs heavily in favor of the conclusion that the defendant's right to a fair trial and impartial jury has been violated."); *United States v. Scott*, 547 F.2d 334, 337 (6th Cir. 1977). The trial judge's omission of the "honest convictions" component is even more troubling because an appropriate charge was included in the first supplemental instruction given to the jury. (JA. at 80). Such an omission risks the jurors believing their responsibilities have changed.

Furthermore, the trial judge's omission of the "honest convictions" component was amplified by the trial judge telling the jurors three separate times they took an oath to reach a verdict. (J.A. at 84-85). While unintentional, the trial judge's instruction emphasized the jurors duty to reach a unanimous verdict without assuring them that dissent was acceptable. *See Burgos*, 55 F.3d at 940.

The time line of the jury's deliberation suggests that the third supplemental instruction had an effect. Once they received the case, the jury deliberated for three days. During that time, they sent out three increasingly emphatic notes saying they were deadlocked and could not reach a verdict. Even though the trial judge twice gave them a standard deadlocked jury instruction the jury could still not reach a verdict. Yet, less than two hours after receiving the third supplemental instruction, the jurors returned a guilty but mentally ill verdict on all counts.

In light of these facts, we conclude the trial judge's third supplemental instruction had a substantial and injurious influence on the jury's verdict that resulted in prejudice to French.

III. Conclusion

At the evidentiary hearing we ordered in this case, the district court determined French did not have counsel during the trial judge's supplemental jury instruction. Because French was without counsel during a critical stage of his trial, the district court correctly granted French's petition for a writ of habeas corpus. The judgment of the U.S. District Court for the Eastern District of Michigan in case 00-2308 is AFFIRMED.

Footnotes

*The Honorable James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.

[1] Ty Jones is not related to Kurt Jones, the appellant in this case.

[2] There was no dispute French committed the shootings. Instead, the issue at trial was French's mental state at the time of the shootings. At trial, French presented expert testimony and other evidence to show he was legally insane on the day of the shootings because an erroneously prescribed overdose of a powerful hypertension drug had combined with a pre-existing mental disorder to make him paranoid and psychotic. In response, the government presented expert testimony that French was legally sane on the day of the shootings.

[3] Michigan law allows a verdict of "guilty but mentally ill." *See* Mich Comp. Laws §§ 768.36. To return such a verdict, a jury must find the following beyond a reasonable doubt: (1) the defendant is guilty of an offense; (2) the defendant was mentally ill at the time of the offense; (3) the defendant was not legally insane at the time of the offense. *See* Mich Comp. Laws §§ 768.36(1). A person found guilty but mentally ill is sentenced the same as if he were simply

found guilty of the offense. Mich. Comp. Laws §§ 768.36(3). The only difference between the two verdicts is that the department of corrections is responsible for evaluating the defendant and providing any required psychiatric treatment. *See id.*

[4] The relevant part of the trial judge's third instruction to the jury is as follows:

> THE COURT: Now, ladies and gentlemen, I must remind you that you did take an oath to render a true and just verdict. But if you are to be expected to render a verdict, you must communicate, and you must talk with each other.
>
> This case lasted how many days, Mr. Hutting? Approximately 16 days?
>
> MR. HUTTING: Fourteen days trial. For jury selection -
>
> THE COURT: All right. So it wouldn't be uncommon for deliberations to go on for some time, and I might remind you that you began to deliberate I think Friday, and I don't know how you can come to the conclusion that you are not going to reach a verdict.
>
> Based upon your oath that you would reach a true and just verdict, we expect you will communicate. As I stated before, exchange ideas. Give your views. Give your opinions and try to come to a verdict, if at all possible.
>
> But if you don't communicate, you know that you can't reach a verdict. And when you took the oath, that was one of the promises that you made by raising your hand taking the oath, that you would deliberate upon a verdict, to try to reach a verdict.

> And we told you at the outset it would not be an easy task, but we know that you can rise to the occasion.
>
> So we'll ask that you return to the jury room.
>
> Thank you.

(J.A. at 84-85).

[5] We decide this case under the AEDPA because French filed his petition for a writ of habeas corpus in October 1998, well after AEDPA's effective date of April 24, 1996. *See Barker v. Yukins*, 199 F.3d 867, 871 (6th Cir. 1999).

[6] The appellant says the following cases describe structural errors because they involve the total deprivation of counsel: *Geders v. United States*, 425 U.S. 80 (1976) (a trial court's order preventing a defendant from consulting with his attorney at all during a recess between his direct and cross-examination); *Herring v. New York*, 422 U.S. 853 (1975) (the trial court's refusal to allow counsel to be heard in summation of the evidence); *Brooks v. Tennessee*, 406 U.S. 605 (1972) (a statute requiring a defendant to testify before any other defense evidence was presented deprived the defendant of the advice of counsel in making the decision); *White v. Maryland*, 373 U.S. 59 (1963) (the denial of counsel at a preliminary hearing where a plea was entered); *Gideon v Wainright*, 372 U.S. 335 (1963) (total deprivation of the right to counsel during trial); *Hamilton v. Alabama*, 368 U.S. 52 (1961) (the denial of counsel at arraignment, the stage at which insanity must be pleaded or the defense forfeited); *Ferguson v. Georgia*, 365 U.S. 570 (1961) (a statute permitting the admission only of the defendant's unsworn statement and the denial of the right to have counsel examine the defendant regarding it); *Williams v. Kaiser*, 323 U.S. 471 (1945) (the refusal to appoint counsel

before entry of the defendant's plea).

[7] *Sullivan* held that "any substantial departure" from ABA standard instruction 5.4 would be grounds for reversible error. *Sullivan*, 392 Mich. at 342, 220 N.W.2d at 450. In *People v. Hardin*, 421 Mich. 296, 365 N.W.2d 101 (1984), the Michigan Supreme Court held that substantial deviation from ABA standard jury instruction 5.4 only warranted reversal if the given instruction was unduly coercive. *Hardin*, 421 Mich. at 314-15, 365 N.W.2d at 109. In deciding if an instruction was unduly coercive, a court considers (1) whether the instruction can cause a juror to abandon his conscientious dissent and defer to the majority in order to reach an agreement; (2) whether the trial court required, or threatened to require, the jury to deliberate for an unreasonable length of time or for unreasonable intervals; or (3) whether the instructions call for the jury to exercise its civic duty in reaching a unanimous verdict contains the message that their failure to reach a verdict is a failure of the jury's purpose. *Id.* at 316, 365 N.W.2d at 110.

APPENDIX B

United States District Court,
E.D. Michigan,
Southern Division.

Oliver FRENCH, Jr.,
Petitioner,

v. **Civil No. 98-CV-74520-DT**
Kurt JONES, Sept. 29, 2000.
Respondent.

Following remand in habeas proceeding, 2000 WL 1033021, the District Court, Tarnow, J., held that defendant's right to counsel was violated, requiring automatic reversal of his conviction, where judge, without defendant's counsel present, gave a supplemental jury instruction to a jury that had indicated three times that it was unable to reach a verdict.

Application conditionally granted.

David A. Moran,
Special Asst. Appellate Defender
Detroit MI,
for Petitioner.

Olga Agnello-Raspa,
Detroit, MI
for Respondent.

OPINION AND ORDER GRANTING THE PETITION FOR WRIT OF HABEAS CORPUS FOLLOWING REMAND FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT. [FN1]

FN1. Staff Attorney Daniel Besser provided quality research assistance.

TARNOW, District Judge.

This matter is before the Court following a remand from the United States Court of Appeals for the Sixth Circuit. On March 25, 1999, the Court granted petitioner a writ of habeas corpus, on the basis that the state trial court gave the jury a supplemental instruction while petitioner's counsel was absent. *French v. Jones,* 41 F.Supp.2d 726 (E.D.Mich.1999). In so ruling, the Court noted that the petitioner had established that he was deprived of the right to the assistance of counsel during a critical stage of the trial, namely, the trial court's re-instruction of a jury that had on three separate occasions indicated to the court that it was hopelessly deadlocked. The Court concluded that because petitioner was deprived of the assistance of counsel during a critical stage of the proceedings, reversal of his conviction was automatic. *Id.* at 733-735.

The respondent appealed the Court's decision to the United States Court of Appeals for the Sixth Circuit. Although the Sixth Circuit agreed with this Court's statement of the law, the Court of Appeals was unable to determine whether petitioner was truly without counsel at the time of the trial court's supplemental jury instruction. The Sixth Circuit remanded the matter back to this Court for an evidentiary hearing for the purpose of determining the precise role that Mr. Ty Jones played in petitioner's defense. *French v. Jones,* 225 F.3d 658, 2000 WL 1033021(6th Cir. July 18, 2000). On August 31, and September 7, 2000, an evidentiary hearing was conducted before this Court. For the reasons stated below, petitioner's application for writ of habeas corpus is again **GRANTED**.

640 I. *The Evidentiary Hearing

Pursuant to the Sixth Circuit's remand order, the Court conducted an evidentiary hearing to determine what role, if

any, Ty Jones played in petitioner's defense at trial. The Sixth Circuit, as well as respondent, both agreed that neither of petitioner's two attorneys of record, Cornelius Pitts or Monsey Wilson, were present in the courtroom when the trial court reinstructed the jury. Prior to the hearing, both this Court and the Sixth Circuit were of the impression that Mr. Jones was an attorney who had been licensed to practice in California, but had not been admitted to practice law in Michigan, either in general or *pro hac vice* for this case.

Ty Jones was the first witness to testify. Mr. Jones testified that he was a motion picture consultant and screenwriter who had known lead counsel Cornelius Pitts for ten years. According to Mr. Jones, Mr. Pitts was interested in the motion picture business and the two men had discussed Mr. Pitts' cases in the past, possibly for a film project. At the time of petitioner's trial, Mr. Jones was engaged in a project concerning the Detroit criminal justice system entitled "1300 Beaubien". [FN2] Mr. Jones wanted a 'birdseye view' of a high profile criminal case in Detroit and asked Mr. Pitts if he could sit 'sidesaddle' with Mr. Pitts to get a close view of a criminal case. Mr. Pitts agreed to his request and Mr. Jones sat at counsel table during trial. According to Mr. Jones, however, Mr. Pitts did not have him do anything and he was simply there to observe. Mr. Jones did acknowledge that during the jury *voir dire,* Mr. Pitts had him write down the names of prospective jurors so that Mr. Pitts could address them by name while questioning them. Mr. Jones attended every day of the trial and was present for deliberations.

> FN2. This is the address of the Detroit Police headquarters.

Contrary to what both this Court and the Sixth Circuit assumed, Mr. Jones is not an attorney. Mr. Jones is not licensed to practice law nor does he possess a law degree. Mr. Jones attended less than one year of law school at New

York University Law School, but never graduated. Mr. Jones denied telling Mr. Pitts, petitioner, or any of the other participants that he was an attorney and he never questioned any witnesses or filed any motions in this case. Specifically, Mr. Jones knew nothing of either federal or Michigan law concerning jury instructions. Mr. Jones did not make any objections or comments to the instruction as given by the trial court nor did he even put his name on the record prior to the jury being reinstructed by the judge.

Monsey Wilson was one of the two attorneys of record who represented petitioner in this case. Mr. Wilson testified that Mr. Pitts was the principal attorney in this case and made the decisions concerning Mr. Jones' participation in the case. Mr. Wilson admitted that Mr. Pitts introduced Mr. Jones at the beginning of trial as counsel from California, but indicated that it was his understanding that Mr. Jones was not representing petitioner. It was Mr. Wilson's belief that Mr. Jones was merely there to assist with whatever Mr. Pitts wanted him [Jones] to do. Mr. Wilson didn't know whether Mr. Jones was, in fact, an attorney, but acknowledged that no one ever moved to have Mr. Jones admitted to practice law *pro hac vice* in this case. Mr. Wilson admitted that he was not present when the trial court read the supplemental jury instruction to the jury.

Cornelius Pitts also testified at the hearing. He indicated that he and Mr. Wilson were the only attorneys of record. Mr. Pitts knew Ty Jones, although not for as long as Mr. Jones claimed that the two men had been acquainted. Mr. Pitts thought that Mr. Jones was an attorney but never checked his credentials. Mr. Pitts further claimed that Mr. Jones had told him that he was a practicing attorney. Mr. Pitts emphasized that he did not plan on using Mr. Jones as a lawyer in the case. Mr. Jones never filed an appearance, nor ***641** did Mr. Pitts move to have Mr. Jones admitted to practice *pro hac vice*. Mr. Pitts never told petitioner that Mr.

Jones was representing him. According to Mr. Pitts, Mr. Jones was supposed to be a 'gofer' for the defense team.

On cross-examination, Mr. Pitts admitted that he had introduced Mr. Jones at the beginning of trial as counsel, but explained that he did this solely to give the jury the impression that petitioner had a defense team representing him. At sentencing, Mr. Pitts had told the trial judge that Mr. Jones had been admitted to practice law in California, but admitted now that this was an erroneous statement.

Augustus Hutting, the trial prosecutor, was also called to testify. Mr. Hutting testified that Mr. Pitts and Mr. Wilson initially were the only trial counsel for petitioner. On the first day of trial, Mr. Pitts introduced Mr. Jones to Mr. Hutting as an attorney from California who specialized in jury selection. Mr. Hutting advised Mr. Pitts that if he wanted Mr. Jones to sit at counsel table, it would have to be approved by the trial court. Mr. Pitts, Mr. Jones. and Mr. Hutting approached the bench, where Mr. Pitts again told the trial judge that Mr. Jones was an attorney from California. Mr. Jones sat at the defense table for the entire trial.

Mr. Hutting testified that he learned about the third note from the jury on Tuesday morning. At the time, Mr. Wilson and Mr. Jones were present in the courtroom. A deputy informed the men that they had received another note and that the judge was sending the jury to lunch early. The deputy also informed the men to return to court at two o'clock, at which point the judge would address the note. When Mr. Hutting returned at two o'clock, Mr. Jones had returned to court, but neither Mr. Pitts nor Mr. Wilson were present. Shortly thereafter, the judge came out and asked where either Mr. Pitts or Mr. Wilson were. Mr. Hutting informed the court that he did not know where either lawyer was, but indicated that Mr. Wilson had been in court when they learned about the note and had been told to return to

court at two o'clock. Mr. Hutting said that the trial court never responded to Mr. Hutting's statement that Mr. Wilson had been ordered to return to court at two o'clock. Mr. Hutting further acknowledged that he had done between four and five hundred trials in Detroit Recorder's Court and had never been present when a judge instructed a jury without defense counsel being present. Finally, Mr. Hutting noted that the jury was reinstructed at 2:07 p.m., only about seven minutes after the attorneys had been told to report back to court.

II. *Discussion*

Respondent now concedes that Mr. Jones was not a licensed attorney. Respondent therefore acknowledges that petitioner was not represented by counsel when the trial court gave the jury the supplemental instruction. Respondent contends, however, that reversal of petitioner's conviction is not automatic, because the error complained of here is not a structural error, but a trial error subject to harmless error analysis. Respondent argues that the situation in the present case does not involve the denial of counsel by the trial court, but instead is more analogous to either a jury communication issue or an ineffective assistance of counsel issue. Thus, the respondent argues, a writ of habeas corpus should not issue in the absence of a finding of prejudice against petitioner. Respondent argues that this Court erred in presuming that the absence of counsel during the giving of the supplemental jury instruction was prejudicial, and urges the Court to find the error to be harmless. This Court cannot accept respondent's argument.

The U.S. Supreme Court has clearly established that the complete denial of counsel during a critical stage of a judicial proceeding mandates a presumption of prejudice. *Roe v. Flores-Ortega,* 528 U.S. 470, 120 S.Ct. 1029, 1038, 145 L.Ed.2d 985 (2000); *Penson v. Ohio*, 488 U.S. 75, 88,

109 S.Ct. 346, 102 L.Ed.2d 300 (1988); *United States v. Cronic,* 466 U.S. 648, 659, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). The existence of certain structural defects in a trial, such as the deprivation of the right to counsel, requires automatic reversal of the conviction because it infects the entire trial process. *Brecht v. Abrahamson,* 507 U.S. 619, 629-630, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). The U.S. Supreme Court has routinely found constitutional error without any specific showing of prejudice to a defendant when counsel is either totally absent, or prevented from assisting the accused during a critical stage of the proceedings. *United States v. Cronic,* 466 U.S. at 659, fn. 25, 104 S.Ct. 2039; *United States v. Minsky,* 963 F.2d 870, 874 (6th Cir.1992).

The return of a supplemental jury instruction is a critical stage of the criminal proceeding. *Rushen v. Spain,* 464 U.S. 114, 119, fn. 4, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983); *Rogers v. United States,* 422 U.S. 35, 38- 40, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975); *Curtis v. Duval,* 124 F.3d 1, 4 (1st Cir.1997). Indeed, the Sixth Circuit agreed with this Court's legal conclusion that the giving of a supplemental jury instruction is a critical stage of the proceedings. *French v. Jones*, 225 F.3d 658; 2000 WL 1033021, * 3 (6th Cir. July 18, 2000). The Sixth Circuit further noted that even the Michigan trial and appellate courts appeared to agree that this was a critical stage of the proceedings. *Id.*, 2000 WL 1033021 * 3, fn. 5.

In *Curtis v. Duval,* the First Circuit agreed with the habeas petitioner that giving a supplemental jury instruction without consulting, and in the absence of, the defendant's attorney, denied the defendant the assistance of counsel at a critical stage of the proceedings. The First Circuit noted that even though this deprivation was short-lived, it occurred "during a vital point in the trial and was, within its terms, total." The First Circuit noted that if it applied the automatic

reversal rule enunciated in *Cronic*, *Penson*, and Parent [FN3], the Court would hold that the error required reversal. *Curtis*, 124 F.3d at 4-5. The First Circuit in *Curtis* declined under the dictates of *Teague v. Lane* to grant habeas relief to the petitioner solely because his conviction had become final in 1983, one year before *Cronic* was decided. *Id.* at 6.

> FN3. *United States v. Parent*, 954 F.2d 23 (1st Cir.1992).

In support of her argument that automatic reversal is not required in this case, respondent cites to the *Rushen* case. In *Rushen*, the U.S. Supreme Court ruled that an unrecorded *ex parte* communication between a trial judge and a juror can be harmless error. *Rushen* does not support respondent's position for several reasons. *Rushen* did not involve the trial court giving supplemental or additional jury instructions to a jury in counsel's absence. The circumstances in *Rushen* involved a juror's *ex parte* communications with the state trial judge concerning her personal acquaintance with an alleged police informant's murder victim and her fear that she might cry if the murder of her friend was explored further at trial. The trial judge told her not to be concerned and that the issue would probably not be discussed again. The judge, however, did not inform the defendants or counsel about these discussions with the juror. *Rushen v. Spain*, 464 U.S. at 115-116, 104 S.Ct. 453. On review, the U.S. Supreme Court found this *ex parte* communication between the judge and juror to be harmless error, because the murder was not related to the crimes at issue, and the communication was innocuous. Id. at 120-121, 104 S.Ct. 453.

[4] The present case does not involve the judge having an innocuous *ex parte* communication with a single juror over an issue unrelated to the case. Instead, it involves the judge, without petitioner's attorney being present, giving a

supplemental jury instruction to a jury that had indicated three times that it was unable to reach a verdict. Counsel was not given an opportunity to view the third note or to respond or object to the trial court's instruction. In *Rushen,* the U.S. Supreme Court noted that although a violation of Fed.Rule Crim.Proc. 43 may be harmless error, additional instructions from a judge to a jury, without notification to defendant or his counsel, is not. *Rushen v. Spain*, 464 U.S. at 119, fn. 4, 104 S.Ct. 453, (citing to *Rogers v. United States*, 422 U.S. 35, 38-40, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975)).

United States v. Harris, 9 F.3d 493 (6th Cir.1993), the case cited by respondent in support of her argument, is also distinguishable from the present case. In *Harris,* the Sixth Circuit ruled that although a defendant's right to be present at every stage of trial was technically violated when the district court failed to contact parties before responding to a note from the jury asking for copies of instructions read to them earlier, the error was harmless where the court did not make a substantive response to the note but, rather, perfunctorily responded by providing the jury with a complete written set of all jury instructions read by the court. *Harris,* 9 F.3d at 499.

In this case, the judge did not merely provide the jury with a written set of all of the jury instructions given previously by the court. After deliberating for parts of five days and sending out two deadlocked jury notes, the jury sent out a third note stating: "We are not able to reach a verdict. We are not going to reach a verdict." Unlike the trial court in *Harris,* the trial court gave a substantive response to the jury's third note. More importantly, the trial court did not merely instruct the jury to continue its deliberations, but gave the jury the following instruction:

> THE COURT: Now, ladies and gentlemen, I must remind you that you did take an oath

to render a true and just verdict. But if you are to be expected to render a verdict, you must communicate, and you must talk with each other. This case lasted how many days, Mr. Hutting?

MR. HUTTING [the prosecutor]: Fourteen days trial. For jury selection-

THE COURT: All right. So it wouldn't be uncommon for deliberations to go on for some time, and I might remind you that you began to deliberate I think Friday, and I don't know how you can come to the conclusion that you are not going to reach a verdict.

Based upon your oath that you would reach a true and just verdict, we expect you will communicate. As I stated before, exchange ideas. Give your views. Give your opinions and try to come to a verdict, if possible.

But if you don't communicate, you know that you can't reach a verdict. And when you took the oath, that was one of the promises that you made by raising your hand taking the oath, that you would deliberate upon a verdict, to try and reach a verdict. And we told you at the outset it would not be an easy task, but we know that you can rise to the occasion.

The giving of supplemental or additional jury instructions to a jury is a critical stage of the proceedings for which petitioner was entitled to the representation of counsel. In the present case, neither of petitioner's attorneys were

present when the jury was reinstructed, nor did they have an opportunity to respond to the jury's note. The only person present during the reinstruction of the jury by the trial court was Mr. Jones, who is clearly not a licensed attorney nor a graduate of a law school.

In light of the record presented from the state trial court concerning the re- instruction of the jury by the trial court, as well as the testimony presented at the evidentiary hearing before this Court, there is no evidence to show that petitioner was represented by counsel during this critical stage in the proceedings. Because counsel was absent from this critical stage of the proceedings, habeas corpus relief is required.

III. *ORDER*

IT IS HEREBY ORDERED THAT PETITIONER'S APPLICATION FOR WRIT OF HABEAS CORPUS IS CONDITIONALLY GRANTED. UNLESS THE STATE TAKES ACTION TO AFFORD PETITIONER A NEW TRIAL WITHIN NINETY (90) DAYS OF THE DATE OF THIS OPINION, HE MAY APPLY FOR A WRIT ORDERING RESPONDENT TO RELEASE HIM FROM CUSTODY FORTHWITH.

APPENDIX C

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

v

OLIVER FRENCH, JR.

Defendant-Appellant.

Unpublished
July 15, 1997

No. 186834
Detroit Recorder's Ct.
LC No. 94-010499

Before: White, P.J., and Cavanagh and J.B. Bruff*, JJ.

PER CURIAM.

A jury found defendant guilty but mentally ill of first-degree murder, MCL 750.316; MSA 28.548, second-degree murder, MCL 750.317; MSA 28.549, assault with intent to commit murder (two counts), MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to life imprisonment without parole for the first-degree murder conviction, fifteen to thirty years' imprisonment for each of the second-degree murder and assault with intent to murder convictions, and two years; consecutive imprisonment for the felony-firearm conviction. On appeal, defendant challenges the trial court's giving a supplemental deadlock instruction to the jury to continue deliberations, in defense counsel's absence, as violative of his Sixth Amendment right to counsel and MCR 6.414, and also argues that the instruction substantially departed from ABA standard jury instruction 5.4 and was coercive. Additionally, he challenges

limitations placed on jury voir dire. We affirm.

I

After a fourteen day trial, the jury began deliberating on the afternoon on April 27, 1995. The jury was instructed to choose a foreperson and, about ten minutes late, the jury was dismissed until the next morning.

On April 28, 1995 the jury began deliberating around 9:15 a.m.* At about 2:58 p.m. that afternoon, the jury sent out the first of three notes indicating it was deadlocked. The first note stated "We can't reach a unanimous decision. Our minds are set." The jury was brought into the courtroom at 3:25 p.m, and the court stated that it had received the note, but that it was adjourning for the day and weekend.

On the morning of Monday, May 1, outside the jury's presence, the court informed counsel that it was going to read the deadlocked jury instruction to the jury because "[T]hey have not deliberated long enough in my mind." The following colloquy ensued:

> MR. HUTTING [prosecutor]: I have no objection to that, Judge. I think that we have spent by my count 13 trial days trying this case. That's from opening statement to final argument. We spent another four trial days seeking to pick a jury, picking the jury. So that's 17 actual trial or working days.
>
> And in a case of that long [six], obviously one day of deliberation is nowhere near sufficient, and I think that we should indicate that to the jury, and whatever can be done to help them reach a verdict or assist them, we are here to do that.

*Circuit judge, sitting on the Court of Appeals by assignment.

THE COURT: All right.

MR. PITTS [defense counsel]: My position, Judge, is that in light of the note, the definitive nature of the note, it doesn't appear to me that we have to be conscious of running a forced verdict type concept on the jury. That is, this type of deadlock jury instruction I guess it is similar to the Allen Charge that I heard sometime before, is one that seems to coerce a jury, and I am not too sure that is what we want to do.

I agree that not a lot of time has elapsed since the time the deliberations began, but by the same token the definitive nature of the note seems to say that it doesn't matter how much time we allowed, it doesn't matter indeed what instruction is given, our minds are made up, and not we are unable or looks like we are unable, we are definitely of the opinion we can't reach a verdict.

So my position is that I would object to the instruction, and I think that as difficult as it might be, that a mistrial would be in order.

THE COURT: Thank you, counsel. But in view of the fact that basically we have had 16 or 17, 18 perhaps working days in this trial, I think it would be unrealistic to think that the jury would deliberate and come back with verdict in a day's time.

So, I am of the opinion that we should give this instruction and hopefully their minds are not set, and we don't force them to do

anything. But I don't think they have had enough time to discuss the case.
So I will bring the jury out.

The jury was brought into courtroom at 9:30 a.m. and instructed as follows:

THE COURT: Good morning. I do trust you had a good weekend.

Okay. Ladies and gentlemen, we did receive your note Friday afternoon stating,

"We can't reach a unanimous decision. Our minds are set."

And I just called you out to indicate as you probably know we have been in a trial in this matter at least 13 or 14 days. We took a few days to select a jury. And this Court [is] of the opinion that you may still reach a verdict, but I don't think you have had enough time to deliberate adequately or to adequately deliberate I should say.

I'm going to read an instruction to you, and hopefully you will pay careful attention to it and try to make application to it before you are convinced that you your minds are set.

Ladies and gentlemen, it is your duty to consult with your fellow jurors and try to reach agreement if you can do so without violating your own judgment.

To return a verdict you must, as you know, all agree, and the verdict must represent the judgment of each of you. As you deliberate, you should carefully and seriously consider the views of your fellow jurors. You should talk things over in a spirit of fairness and frankness.

As we understand, and it is natural that there will be differences of opinion. But you should each not only express your opinion. And by reasoning the matter out jurors more often than not can reach agreement.

When you continue your deliberations again, ladies and gentlemen, don't hesitate to rethink your own views and change your opinion if you decide that it was wrong. But again we're not asking that any of you should give up your honest beliefs about the weight or effect of the evidence only because of what your fellow jurors think or only for the sake of reaching an agreement.

But again you should talk this matter over. Rethink your position. Make some adjustment if you find that your position was taken erroneously, but the most important thing, ladies and gentlemen, is to talk it over and to reason it out, and we are sure if you do this in the spirit of fairness and frankness and in an honest effort, that you really can come to a decision.

It would be far-fetched to think that you could arrive at a decision within, really within a day's deliberation because this matter has gone on for some time. But the thing is to communicate and explain ideas and give opinions for your ideas and talk about it. You can't reach a decision unless you talk about it. And as I stated before, sometimes it requires that you do rethink your position. But don't go in with your mind set. Have an open mind as you discuss things in fairness.

So again we are going to ask that you return to the jury room. Deliberate and talk, exchange ideas. Give the basis for your various ideas and opinions, and we think you will be able to reach a fair verdict.

We will ask that you retire again to the deliberation room, ladies and gentlemen, and try your best to reach a fair,

hones decision not feeling pressured or anything or that nature, but you must exchange ideas and opinions. That is all we're asking that you do.

Thank you.

The jury deliberated until about 3:20p.m. when it sent its second note that is was deadlocked. They jury was then excused for the day.

On the morning of May 2, 1995, the court indicated to the jury that it had received its note of May 1, which stated "We have followed your instructions. We are still unable tor each a decision." The court then stated:

> Well, I just want to let you know that if there is anything we can do to assist you within the, of course, rules, and the law, we will be more than happy to do that.
>
> If there are any exhibits or anything that you need, all you need to do is to ask for them. But again we just ask that you just at this time continue to communicate. Express your opinions, your views, reasons for them and just continue to deliberate and see if you reach a verdict. But you must communicate. That you must do. Okay. That's all.

An hour and a half later, at about 11:00 a.m., the jury sent out its third note regarding being deadlocked, which the court took up after lunch, at a time when the prosecutor was present but defense counsel were not.

> THE COURT: I trust you had a good lunch. I did too. We received your last note that stated: "We are not able to reach a verdict.

WE are not underlined going a [sic] reach a verdict."

That was approximately 11 o'clock this morning. Then we sent you to lunch to give you an opportunity to just kind of toss it around individually in your minds, and then we got you back this afternoon after lunch. Now, ladies and gentlemen, I must remind you that you did take an oath to render a true and just verdict. But if you are to be expected to render a verdict, you must communicate, and you must talk with each other.

This case lasted how many days, Mr. Hutting? Approximately 16 days?

MR. HUTTING: Fourteen days trials. For jury selection -

THE COURT: All right. So it wouldn't be uncommon for deliberations to go on for some time, and I might remind you that you began to deliberate I think Friday, and I don't know how you can come to the conclusion that you are not going to reach a verdict.

Based upon your oath that you would reach a true and just verdict, we expect you will communicate. As I stated before, exchange ideas. Give your views. Give your opinions and try to come to a verdict, if at all possible.

But if you don't communicate, you know that you can't reach a verdict. And when you took the oath, that was one of the promises that your made by raising your hand taking the

oath, that you would deliberate upon a verdict, to try to reach a verdict. And we told you at the outset it would not be an easy task, but we know that you can rise to the occasion.

So we'll ask that you return to the jury room. Thank you.

(Whereupon the jury leaves the courtroom at 2:10 p.m.)

The jury deliberated until 3:30 p.m. on May 2, 1995.

On May 3, 1995, defense counsel again moved for a mistrial, on the basis that the jury's three notes express definitively and emphatically that they could not reach a verdict, and that due process dictated that defendant be tried again. Defense counsel did not raise that he or co-counsel was not present when the court last instructed the jury to continue deliberating . Shortly after the court stated that is was prepared to declare a mistrial, and as counsel continued to argue, the jury came in with its verdict.

Defendant moved for a new trial before sentencing on the basis that defendant was deprived of his Sixth Amendment right to counsel when the court instructed the jury, after receiving the third note regarding being deadlocked, in defense counsel's absence, and on the basis that the instruction was coercive.

The court heard defendant's motion for new trial on the day of sentencing. The prosecutor argued that he was certain that, while neither Mr. Pitts nor Mr. Wilson were present when the court address the jury after the third note was sent out, Mr. Ty Jones had been present, and that Mr. Jones had been present throughout the jury's deliberations. Defense counsel responded by arguing that Mr. Jones was merely an investigator assisting counsel, did not file an

appearance, was licensed to practice law only in California, and never addressed the court or questioned witnesses.

The court noted that:

> The only argument that . . . has some merit is the one that pertains to . . . . . the actual representation of Mr. French by either or his lawyers.
>
> However, at this time this Court is prepared to go ahead with the sentencing, and I would deal with that issue as to the none [sic] representation by counsel of Mr. French at a period that this Court will concede would be a critical stage in these proceedings.

The court denied defendant's motion for new trial. This appeal ensued.

II

Defendant first argues that the Sixth Amendment and MCR 6.414 (A) mandate that his conviction be reversed because the trial court gave supplemental instructions to the jury and engaged in a colloquy with the prosecutor in defense counsel's absence. Defendant argues that a harmless error analysis does not apply, and even if it does, the error was not harmless. Relatedly, defendant asserts that the supplemental instruction requires reversal, in and of itself, because it substantially deviated from ABA Standard Jury Instruction 5.4.

A criminal defendant has a due process right to be present and to have counsel present at all critical stages of trial. *Rushen v Spain*, 464 US 114, 117; 78 L Ed 2d 267; 104 S Ct 453 (1983). The United States Supreme Court has

"uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *United States v Cronic*, 466 US 648, 659 n25; 104 S Ct 2039; 80 L Ed 2d 657 (1984). Jury deliberations and the return of the verdict constitute critical stages of a criminal trial for purposes of the Sixth Amendment, although counsel's absence does not require automatic reversal. *Siversion v O'Leary*, 764 F2d 1208, 1217 (CA 7, 1985).

It is well-settled that once the jury has begun to deliberate, counsel must be given an opportunity to be heard before the trial court responds to any juror inquiry. *United States v Smith*, 31 F 3d 469, 471 (CA 7, 1994) (citing *Rogers v United States*, 422 US 35; 95 S Ct 2091; 45 L Ed 2d 1 (1975)). Communications with a deliberating jury outside the presence of the counsel are prohibited. *People v Wytcherly*, 172 Mich App 213, 217-218; 431 NW2d 463 (1988), on reh'g 176 Mich App 714 (1989); MCR 6.414. However, automatic reversal does not necessarily follow. *People v France*, 436 Mich 138, 142-143; 461 NW2d 621 (1990). It is incumbent on a reviewing court to first categorize the communication that is the basis of the appeal as either substantive, administrative, or housekeeping. *Id.* Administrative communications include instructions that encourage a jury to continue its deliberations, and carry no presumption of prejudice. Upon an objection, the burden of persuasion lies with the nonobjecting party to reviewing court, upon its own volition, may find that an instruction which encourages a jury to continue its deliberations was prejudical to the defendant because it violated ABA Standard Jury Instruction 5.4(b). *Id.* At 143-144, 163-164. In the instant case, applying this analysis, we conclude that while defendant's Sixth Amendment right was violated, reversal is not required..

In *People v Sullivan*, 392 Mich 324, 341-342 (1974), the Michigan Supreme Court adopted the American Bar

Association's Minimum Standard for Criminal Justice 5/4 as the instruction that should be read to juries that are deadlocked. The most recent version of the ABA instruction was quoted in *People v Pollick*, 448 Mich 376, 381-382; 531 NW2d 159 (1995), and is as follows:

> (a) Before the jury retires for deliberation, the court may give an instruction which informs the jury:
>
> (i) that in order to return a verdict, each juror must agree thereto.
>
> (ii) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can e done without violence to individual judgment;
>
> (iii) that each juror must decide the case for himself or herself but only after an impartial consideration of the evidence with the other jurors;
>
> (iv) that in the course of deliberations, a juror should not hesitate to re-examine his or her own views and change an opinion if the juror convinces it is erroneous; and
>
> (v) that no juror should surrender his or her honest conviction as to the weight or effect of the evidence solely because of the opinion of the other jurors, or for the mere purpose of returning a verdict.
>
> (b) If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations

> and may give or repeat an instruction as provided in paragraph (a). The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.
>
> (c) The jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement.

CJI2d 3.12 is based upon the ABA model instruction.

Any substantial departure from the ABA instruction is reversible error. *Pollick, supra* at 382. However, the test for determining whether an instruction substantially departs from the ABA standard is whether the instruction is unduly coercive, not whether the words used match the words of the ABA standard:

> The significance of a 'substantial departure' is the risk that the resultant instruction will be more coercive than the ABA instruction. The test for determining whether a departure from ABA standard 5.4 is substantial cannot rest simply on a gross difference in language. The instruction that departs from ABA standard 5.4 must also have an undue tendency of coercion - e.g., could the instruction given cause a juror to abandon his conscientious dissent and defer to the majority solely for the sake of reaching agreement? [*People v Hardin*, 421 Mich 314; 365 NW2d 101 (1984).]

The instruction should be examined in the factual context in which it was given. *Pollick, supra* at 384.

> Also relevant is whether the court required, or threatened to require, the jury to deliberate for an unreasonable length of time or for unreasonable intervals... In addition, as we noted in *People v Goldsmith* [411 Mich 555; 309 NW2d 182 (1981)], a case concerning a *Sullivan* instruction given as part of the main charge to the jury, an instruction that calls for the jury, as part of its civic duty, to reach a unanimous verdict and which contains the message that the failure to reach a verdict constitutes a failure or purpose, is a substantial departure, but the reason it is, is because it tends to be coercive. [*Pollick*, 448 Mich at 3840385, quoting *Hardin*, 421 Mich at 316.]

"The optimum instruction will generate discussion directed towards the resolution of the case but will avoid forcing a decision." *Sullivan*, 392 Mich at 334.

In the case at bar, the trial court gave the instruction at issue after the jury had been deliberating for its third (April 28, May 1 and May 2). Thus, this is unlike the situation in *Pollick, supra*, where the jury had not yet begun to deliberate. Instructions given to a jury that has not yet begun to deliberate are less likely to weigh on dissenting jurors or to be interpreted as a request for the jurors to abandon their views for the sake of reaching a verdict. *Pollick, supra* at 385. However, this does not alone render the instruction coercive. *Hardin, supra.*

The trial court's instructions must be read as whole. *People v Moldenhauer*, 210 Mich App 158, 159; 533 NW2d 9 (1995). The trial court gave the standard jury instruction on deliberating before the jury began its deliberations. The court then instructed the jury consistent with the ABA model instruction and CJI2d 3.12 after the jury sent out its first note. Thus, the jury was well instructed on the deliberative process

and was reminded, even after first declaring itself deadlocked, that no jury member should surrender his or her hones conviction solely for the purpose of returning a verdict. While the court's last instruction did not remind the jury of this point, it did not negate the point either. The court's supplemental instruction focused on deliberation and the need for discussion and communication. It told the jury that it had an obligation to communicate, not that it had an obligation to render a verdict. The court spoke of "try[ing] to come to a verdict" and of a promise to "deliberate upon a verdict, to try to reach a verdict." There was no plea to the juror's civic duty or threat to require the jurors to deliberate indefinitely. The trial court's comments regarding the jurors' oath to return a verdict did not unduly emphasize the need to reach a verdict, but, rather, focused on the need to communicate with one another to try to reach a verdict, if possible. Further, the jury did not respond to the instruction by rendering a verdict immediately, or before retiring for the day. Rather, the jury resumed deliberations,, deliberating for an hour and twenty minutes that afternoon, and 2 ½ to three hours the following morning, eventually rendering a verdict.

While the court did not follow the ABA standard instruction in its third instruction to the jury, this along is not basis for reversal. *Hardin, supra.* The court's supplemental instruction did not threaten the jurors into giving up their honest convictions, or imply that a juror should give up his or her views in order to reach a verdict. While we caution against departure from the ABA standard instruction and urge the trial court to measure any supplemental instructions against that standard before instructing the jury, we conclude that the overall effect of the court's supplemental instruction in this case was to focus on the obligation to communicate and that the instruction was not coercive.

III

Defendant next argues that the trial court refused to let defense counsel ask prospective jurors probing questions concerning their attitudes about race and thereby deprived defendant of a fair trial. We disagree. During voir dire, racial prejudice was a theme both sides explored because the victims were white and defendant is African-American. While the prosecutor only briefly mentioned this fact, defense counsel asked numerous questions and addressed the jury on this topic many times. Defense counsel posed two questions that the trial court disallowed following the prosecutor's objection. The first question had to do with the jurors' views on affirmative action, and the second question was whether a white juror would allow his daughter to marry a black man. The trial court restricted the questioning to more objective areas, such as whether the jurors socialized with those of other races and the racial composition of their neighborhoods. We conclude that in light of the extensive voir dire, defendant's inability to pursue these two questions did not deprive him of an opportunity to explore the prospective juror's racial attitudes and did not deprive him of a fair trial.

Affirmed. /s/ Helene N. White
/s/ Mark J. Cavanagh
/s/ John B. Bruff

At 10:25 a.m. the jury sent out a note requesting the curriculum vitaes and reports of the doctors that testified, copy of the transcript, and guidelines and definitions of possible verdicts. At 10:56 a.m., the jury was read the elements of the charges and counts, and the definitions of mental illness, mental retardation and legal insanity. The jury returned to deliberate at 11:15 a.m. and later that afternoon (time not indicated in transcript) sent out another note, which stated:

> Please, we respectfully request a copy of the elements of first degree and second degree

> murder. Definition of mental illness, legal insanity. We would like to have a copy, not to rely on memory. If we cannot have a copy, just tell us no. Please do not brings [sic] us out again.

The court sent the jury written instructions, and deliberations continued..

The sentencing transcript indicates that the court made this argument, but it appears from the context that the prosecutor made these remarks.

ORIGINAL

Supreme Court, U.S.
FILED
APR 25 2002
CLERK

NO. 01-1413

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

KURT JONES, Warden

Petitioner,

v.

OLIVER FRENCH, JR.,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

RESPONDENT'S MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

AFFIDAVIT IN SUPPORT OF MOTION

STATE APPELLATE DEFENDER OFFICE

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Attorney for Respondent

NO. 01-1413

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

KURT JONES, Warden

Petitioner,

v.

OLIVER FRENCH, JR.,

Respondent.

RESPONDENT'S MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent Oliver French, Jr., respectfully asks this Honorable Court for leave to proceed *in forma pauperis* so that he may file the accompanying Brief in Opposition to Petition for a Writ of Certiorari with this Court.

Respondent was found by the state trial court to be indigent for purposes of state appellate proceedings, was appointed counsel for that purpose, and is still represented in this Court by that appointed counsel.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: _____

DAVID A. MORAN
(Counsel of Record)
645 Griswold
3300 Penobscot Building
Detroit, Michigan 48226
(313) 256-9833

Attorney for Respondent

Dated: April 23, 2002

NO. 01-1413

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

KURT JONES,

Petitioner,

v.

OLIVER FRENCH, JR.,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Oliver French, Jr., being first duly sworn, depose and say that I am the Respondent in the above-entitled case and that because of my poverty I am unable to pay the costs associated with defending in this Court the judgment of the United States Court of Appeals for the Sixth Circuit.

I further swear that the responses which I make below relating to my ability to pay the costs of defending this appeal are true:

1. Are you presently employed? Yes

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

My salary a month, $60.00. My yearly income with overtime, from 2001-2002, totaled $1192.00. As of 2-26-02, I have $1200.17, in my account. Work address, Macomb Correctional Fac., 34625 26 Mile Rd., New Haven, Michigan 48048.

BEST AVAILABLE COPY

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? NO

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? NO

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? NO

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

_____

_____

I understand that a false statement or answer to any question in this affidavit will subject me to the penalties for perjury.

OLIVER FRENCH, JR.

Subscribed and sworn to before me
this 01 day of April, 2002.

LISA A. WALSH
NOTARY PUBLIC MACOMB CO., MI
MY COMMISSION EXPIRES Dec 6, 2005

Notary Public, Macomb County, Michigan
My Commission Expires: 12/05/2005

NO. 01-1413

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

KURT JONES, Warden

Petitioner,

v.

OLIVER FRENCH, JR.,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATE APPELLATE DEFENDER OFFICE

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Attorney for Respondent

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STATEMENT OF THE CASE

Petitioner has omitted the full history of this case in federal court and neglected to append the first set of opinions from the district court and the Sixth Circuit. Respondent, Oliver French, Jr., therefore appends those opinions and briefly discusses the history of this case.

The district court first granted Respondent's habeas petition in 1999. *French v. Jones*, 41 F.Supp.2d 726 (E.D. Mich. 1999) (1b-17b). In granting the petition the district court agreed with the Michigan Court of Appeals that Respondent's Sixth Amendment right to the assistance of counsel at all critical stages of his trial had been violated when the trial court, in the complete absence of Respondent's two attorneys, delivered an extemporaneous and improper deadlock jury instruction to a jury that had three times declared itself hopelessly deadlocked. *Id.*, 41 F.Supp.2d at 730-732 (7b-10b); *see also People v. French*, No. 186834 (Mich. Ct. App. 1997) (38a-39a) (finding Respondent's Sixth Amendment rights violated by absence of counsel). In so holding, the district court, like the Michigan Court of Appeals, specifically considered and rejected Petitioner's argument that a purported California attorney named Ty Jones was serving as Respondent's counsel at the time of the reinstruction. *Id.*, 41 F.Supp.2d at 730-731 (7b-19b); *see also People v. French, supra* (37a-38a, 39a) (noting prosecutor's argument that Ty Jones served as Respondent's counsel but holding "defendant's Sixth Amendment right was violated").

The district court held that the Michigan Court of Appeals' holding that the absence of counsel at a critical stage was subject to harmless error analysis was contrary to, or an unreasonable application of, several of this Court's decisions, including *United States v. Cronic*, 466 U.S. 648, 659 (1984); *Rushen v. Spain*, 464 U.S. 114, 119 n. 4 (1983); *Penson v. Ohio*,

488 U.S. 75, 88 (1988); and *Brecht v. Abrahamson*, 507 U.S. 619, 629-630 (1993). *Id.*, 41 F.Supp.2d at 732-734 (10b-15b). The district court also observed that the Michigan Court of Appeals had never actually applied harmless error analysis but had simply declared the error to be harmless. *Id.*, 41 F.Supp.2d at 735 (15b-16b).

Petitioner appealed, and the Sixth Circuit issued an unpublished opinion vacating the district court's opinion and remanding for an evidentiary hearing to determine whether Ty Jones was acting as Respondent's counsel at the time the trial court gave its extemporaneous instruction to the deadlocked jury. *French v. Jones*, No. 99-1436 (6th Cir. 2000) (18b-29b). In so ordering, the Sixth Circuit specifically stated that it agreed that this Court's precedents would require automatic reversal if Respondent did not have counsel present during the trial court's extemporaneous reinstruction of the deadlocked jury. *See id.*, slip op. at 7-9 (24b-26b) (agreeing with district court that Supreme Court precedent mandates automatic reversal for absence of counsel at critical stage and reinstruction of a deadlocked jury is critical stage).

The district court held that evidentiary hearing and determined that Ty Jones had never served as Respondent's counsel and, in fact, had never been an attorney at all. Accordingly, the district court again granted the writ of habeas corpus. *French v. Jones*, 114 F.Supp.2d 638 (E.D. Mich. 2000) (19a-29a).

The Sixth Circuit affirmed. *French v. Jones*, 282 F.3d 893 (6th Cir. 2002) (1a-18a). In affirming, the Sixth Circuit first held that this Court's precedents automatically compelled a new trial because Respondent had no counsel present during a critical stage of his trial, the reinstruction of a deadlocked jury. *Id.*, 282 F.3d at 898-901 (8a-12a). The Sixth Circuit went on to hold, however, that the deprivation of counsel also "likely had a substantial and injurious

influence on the jury's verdict" because the trial judge gave an improper and extemporaneous deadlock jury instruction to a hopelessly deadlocked jury in the absence of Respondent's counsel. *Id.*, 282 F.3d at 901-902 (12a-14a).

ARGUMENT

I. **None of Petitioner's questions is presented by this case since the Sixth Circuit found both structural error and prejudice, since the absence of counsel clearly occurred at a critical stage, since the record does not support Petitioner's claim that the absence of counsel was attributable to the defense, and since the Sixth Circuit applied the correct standard of review.**

Petitioner's first question asks this Court to draw a line between absences of counsel caused by errors attributable to the State, which would be subject to automatic reversal, and absences of counsel attributable to the defense, which Petitioner argues should be subject to reversal only on showing of prejudice. Petitioner's second question asks this Court to declare that the extemporaneous reinstruction of Respondent's hopelessly deadlocked jury was not a critical stage because, according to Petitioner, nothing of importance really happened. Petitioner's third question consists of a complaint that the Sixth Circuit was insufficiently deferential to the state court.

None of Petitioner's questions is implicated by this litigation. In its first question, Petitioner overlooks the fact that the Sixth Circuit specifically found *both* that automatic reversal was required, *see French*, 282 F.3d at 898-901 (8a-12a), *and* that the error was substantial and injurious to the verdict. *See id.* at 901-902 (12a-14a). *Cf. Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001) (en banc) (holding automatic reversal required, without finding prejudice, where attorney slept during portions of trial); *Cone v. Bell*, 243 F.3d 961 (6th Cir. 2001) (holding automatic reversal required, without finding prejudice, where attorney made no argument during capital sentencing hearing), *cert. granted*, 122 S.Ct. 663 (2001). Since the Sixth Circuit did find

substantial prejudice, a finding that is clearly correct. Petitioner cannot prevail even if this Court were to adopt Petitioner's argument.

Petitioner also could not prevail because no state or federal court in this case has ever found that the absence of Respondent's counsel was due to defense error. As discussed below, the record here unambiguously demonstrates that the trial court understood that Ty Jones was not serving as Respondent's counsel, but the trial court knowingly elected to conduct a critical stage without Respondent's counsel because counsel was seven minutes late.

Petitioner's second question is not presented because, as the Sixth Circuit found, the absence of counsel unquestionably occurred during a proceeding of great importance, namely the extemporaneous and improper reinstruction of a jury that had declared itself hopelessly deadlocked three times. After hearing the improper and coercive instructions without counsel present to object, the previously deadlocked jury returned a verdict. Finally, Petitioner's third question is not presented because the Sixth Circuit clearly applied the proper standard of review.

A. The Sixth Circuit correctly held that Respondent was deprived of counsel at a critical stage and, therefore, was entitled to automatic reversal.

The Sixth Circuit first held that Respondent was automatically entitled to a new trial because the trial court conducted a critical stage of the proceedings in the absence of defense counsel. That holding is correct. Five days after it began deliberating, having sent out two notes indicating that it was hopelessly deadlocked and having received two sets of deadlock jury instructions, the jury sent out an emphatic third note: "We are not able to reach a verdict. We are *not* going to reach a verdict." *French*, 282 F.3d at 896 (5a) (emphasis in original).

In response, the trial court brought the jury into the courtroom, in the complete absence of defense counsel, and delivered an extemporaneous instruction during which the court three times told the jurors that they had taken an oath to reach a verdict. *Id.* at 902 (14a). During this instruction, the court never warned the jurors against surrendering their honest beliefs in order to reach a verdict. *Id.* (13a-14a). The jury, which had declared itself hopelessly deadlocked on three occasions over several days, was suddenly able to reach a verdict, guilty but mentally ill, after less than two more hours of deliberations. *Id.* (14a).

On appeal, the Michigan Court of Appeals, after considering and rejecting the prosecutor's argument that Respondent did have counsel present in the person of Ty Jones, held that Respondent had been denied his Sixth Amendment right to the assistance of counsel at a critical stage. *People v. French*, No 186834 (Mich. Ct. App. 1997) (39a). However, the court went on to conclude that automatic reversal was not required. *Id.* (39a).

As the Sixth Circuit held, the Michigan Court of Appeals' refusal to automatically reverse Respondent's conviction is contrary to a raft of this Court's precedents, including *United States v. Cronic*, 466 U.S. 648, 659 & n. 25 (1984), *Holloway v. Arkansas*, 435 U.S. 475, 489 (1978), *Penson v. Ohio*, 488 U.S. 75, 88 (1988), and *Brecht v. Abrahamson*, 507 U.S. 619, 629-630 (1993). *French*, 282 F.3d at 900 (10a-11a).[1]

---

[1] Petitioner characterizes this Court's discussion of the automatic reversal rule in *Cronic* as "dicta." Petition at 10. Petitioner ignores the fact that this Court has repeatedly stated the same rule both before and after *Cronic* and has repeatedly cited *Cronic* for this proposition. J2ust one month ago, this Court explained, "We have spared the defendant the need of showing probable effect upon the outcome, and have simply presumed such effect, where assistance of counsel has been denied entirely or during a critical stage of the proceedings. When that has occurred, the likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary. *See Cronic*, 466 U.S. at 658-659." *Mickens v. Taylor*, ___ U.S. ___, 122 S.Ct. 1237 (2002).

The trial court, the Michigan Court of Appeals, the district court, and the Sixth Circuit all correctly found that the instruction of a deliberating jury is a critical stage. *See, e.g., Shields v. United States*, 273 U.S. 583, 588-589 (1927), *Curtis v. Duval*, 124 F.3d 1, 4 (1st Cir. 1997) ("recalling the jury for supplemental instructions after deliberations are underway is a critical stage of a criminal trial"). In the context of Respondent's trial, it would be difficult to imagine a more critical stage than the judge's extemporaneous instructions to a jury that had three times declared itself hopelessly deadlocked, particularly since that final set of instructions produced a verdict after only a few more hours of deliberations.

The Sixth Circuit also correctly rejected Petitioner's claim, renewed here, that this case is similar to *Rushen v. Spain*, 464 U.S. 114 (1983). In *Rushen*, this Court held that harmless error analysis could be applied to the trial judge's *out-of-court* contact with a *single* member of the jury. 464 U.S. at 118-120. In so holding, this Court explicitly noted that such an *ex parte* contact is different for structural error purposes than the delivery of a supplemental instruction to the entire jury in the absence of counsel: "*See, e.g. Rogers v. United States*, 422 U.S. 35, 38-40 (1975) (although violation of Federal Rule of Criminal Procedure 43 may be harmless error, additional instructions from judge to jury, without notification to defendant or his counsel is not)." *Rushen*, 464 U.S. at 119 n. 4. Thus, this Court took pains to distinguish between an *out-of-court* contact with a member of the jury, which is presumably not a critical stage of a criminal trial, and the delivery of instructions to a deliberating jury, which obviously is.

In this Court, Petitioner argues that a reviewing court cannot determine whether a proceeding is a critical stage without first determining whether something critical happened during that proceeding. But this argument is not implicated by this case because the Sixth

Circuit clearly determined that something very critical did occur, namely the trial court's improper and extemporaneous reinstruction of a jury that had, until that point, declared itself hopelessly deadlocked three times. As the Sixth Circuit explained:

> *The time line of the jury's deliberation suggests that the third supplemental instruction had an effect.* Once they received the case, the jury deliberated for three days. During that time, they sent out three increasingly emphatic notes saying they were deadlocked and could not reach a verdict. Even though the trial judge twice gave them a standard deadlocked jury instruction the jury could still not reach a verdict. *Yet, less than two hours after receiving the third supplemental instruction, the jurors returned a guilty but mentally ill verdict on all counts.*

French, 282 F.3d at 902 (14a) (emphasis added).

In short, the Sixth Circuit did what Petitioner requests by examining the proceeding and determining that it was a critical stage. Since the proceeding was a critical stage and counsel was absent, the Sixth Circuit correctly applied the rule of automatic reversal.

B. Petitioner's proposed distinction between "deprivation" of counsel and "absence" is irrelevant since the Sixth Circuit found prejudice and inapplicable since the absence of counsel was not attributable to the defense.

Petitioner claims in its first question that the rule of automatic reversal does not apply because the State did not "deprive" Respondent of counsel but, instead, the defense team was to blame for the "absence" of counsel by misstating Mr. Jones' credentials at the beginning of the trial. This claim is legally wrong, irrelevant, and inapplicable to this case.

Respondent first observes that Petitioner does not cite any cases distinguishing between absences that are the fault of the court and absences that are the fault of defense counsel for

purposes of automatic reversal. On the contrary, American courts have uniformly applied the rule of automatic reversal to cases where the trial court was blameless for the absence of counsel. *See Green v. Arn*, 809 F.2d 1257, 1259-1262 (6th Cir. 1987) (applying automatic reversal rule where counsel absented himself from trial to attend funeral), *remanded on other grounds*, 488 U.S. 1034 (1989); *Vance v. Lehmann*, 64 F.3d 119, 122 (3rd Cir. 1995) ("Another situation which would warrant the application of a *per se* rule finding a violation of the Sixth Amendment is where the defendant is represented by someone with little or no legal training who is masquerading as an attorney" (string citation omitted)); *United States v. Rondon*, 204 F.3d 376, 379 (2nd Cir. 2000) (*per se* rule applies "when, unknown to the defendant, counsel was, at the time of representation, not duly licensed to practice law because of a failure ever to meet the substantive requirements for the practice of law" (citations, internal quotation marks, and enumeration emitted)).

More importantly, however, Petitioner's claim is irrelevant to the disposition of this case because the Sixth Circuit found that the absence of counsel in this case both required automatic reversal *and* "likely had a substantial and injurious influence on the jury's verdict." *French*, 282 F.3d at 901 (12a). In other words, even if this Court agrees with Petitioner that reversal in this case should require a showing of prejudice, that showing was made here.

The Sixth Circuit's finding of prejudice was correct. On direct appeal, the Michigan Court of Appeals declared the Sixth Amendment violation to be harmless without applying, or citing, the harmless beyond a reasonable doubt standard of *Chapman v. California*, 386 U.S. 18, 24 (1967). At no point in the Michigan Court of Appeals' opinion did that court consider the question required in any form of harmless error analysis: would the same result have been

reached if counsel had been present during the re-instruction of the deadlocked jury? Instead, the Michigan Court of Appeals collapsed the Sixth Amendment error into the instructional error and never applied any harmless error analysis at all to the Sixth Amendment error.

The Sixth Amendment error here was obviously prejudicial because defense counsel's absence deprived Respondent of an opportunity to influence the judge's extemporaneous deadlock instructions, to make a contemporaneous objection, and to make a timely motion for mistrial. There is no chance that Respondent's trial counsel would have sat quietly while the trial court delivered the deadlock jury instruction at issue in this case, which the Michigan Court of Appeals acknowledged was a departure from the approved A.B.A. instruction. *See People v. French*, No. 186834 (Mich. Ct. App. 1997) (43a) ("the court did not follow the ABA standard instruction in its third instruction to the jury"). Indeed, Respondent's counsel had moved for mistrial after the *first* deadlock jury note came out because he was concerned that an instruction would coerce the jury into unanimity. *See French*, 282 F.3d at 896 (5a).

After receiving the proper deadlock jury instruction, the jury issued a second deadlock note and then issued a third note that was absolutely emphatic: "We are not able to reach a verdict. We are *not* going a reach a verdict." *French*, 282 F.3d at 896 (5a) (emphasis in original). Since the defense had made an earlier motion for a mistrial in response to a much less emphatic note and had expressed concern at that time about the danger of coercing the jury, it was critical that defense counsel help shape the judge's response to the note and, if necessary, make a contemporaneous objection to that response.

It would be fantasy to believe that any competent lawyer would have sat quietly during the court's third re-instruction. If counsel had been present, he would have reminded the court,

as he did in response to the first note, that it needed to carefully avoid coercing the jury. He would have insisted that the trial court remind the dissenting jurors of the need to hold on to their conscientious beliefs. He would not have countenanced an instruction that repeatedly invoked the jurors' "oath" to return a verdict. There is no doubt that counsel would have vociferously objected to an extemporaneous instruction that bore no resemblance to the approved Michigan deadlock jury instruction.

Finally, as the Sixth Circuit specifically found, the extemporaneous instruction itself and the fact that it promptly produced a verdict from a previously hopelessly deadlocked jury make it clear that the error had a substantial and injurious impact on the verdict. *French*, 282 F.3d at 901-902 (12a-14a). Nowhere in the trial court's instruction was there even a hint of an admonition that dissenting jurors should not give up their conscientious beliefs in order to reach a verdict. *See Jenkins v. United States*, 380 U.S. 445, 446 (1965) ("the principle that jurors may not be coerced into surrendering views conscientiously held is so clear as to require no elaboration"); *United States v. Scott*, 547 F.2d 334, 337 (6th Cir. 1977) (finding deadlock jury instruction unconstitutionally coercive because "at no point in the supplemental charge did the trial judge remind the jurors that no one of them should surrender an honest conviction about the case simply because other jurors disagreed"); *Jiminez v. Myers*, 40 F.3d 976, 981 n. 5 (9th Cir. 1993) ("trial court's failure to give such a cautionary instruction [the warning against surrendering honest beliefs] weighs heavily in favor of the conclusion that the defendant's right to a fair trial and impartial jury has been violated"). The supplemental instruction given in the absence of counsel repeatedly stressed to the jurors that they had a duty, and were bound by the "oath" they had taken, to actually reach a verdict. To make matters worse yet, the trial court

also engaged in a colloquy with the prosecutor in front of the jury about the length of the trial in order to hammer home the point that the jury had not deliberated nearly long enough. *See French*, 282 F.3d at 896 n. 4 (16a) (quoting instruction).

As the Sixth Circuit held, this improper instruction was obviously effective. The jury, having sent out three increasingly emphatic notes indicating that it was hopelessly deadlocked, promptly returned a verdict after less than two more hours of deliberations. *French*, 282 F.3d at 902 (14a). Since defense counsel could not influence the instruction or discourage the court from giving it, could not contemporaneously object, and could not immediately move for mistrial before the jury returned with the verdict, the Sixth Circuit correctly held that the error was prejudicial and likely had a substantial and injurious effect on the verdict. *Id.* at 901 (12a).

Therefore, Petitioner's attempt to distinguish between absences of counsel caused by the court and absences caused by the defense for purposes of harmless error analysis is irrelevant to the disposition of this case. Either way, Respondent is entitled to habeas relief.

Finally, Petitioner's argument is also inapplicable to this case because it assumes that the trial court was misled into believing that Mr. Jones was serving as Respondent's counsel at the time of the third supplemental instruction, but the record shows otherwise. While the trial court may have thought that Mr. Jones was an attorney from California, the trial court's words and actions clearly show that the trial court never regarded Mr. Jones as *Respondent's counsel*.

It is true that Respondent's lead attorney had introduced Mr. Jones at the beginning of the trial as "a counsel from California, who is aiding and assisting us temporarily here." However, Mr. Jones sat silently at counsel table throughout the trial, never filed an appearance,

never moved to practice *pro hac vice*, never addressed the jury, never questioned a witness, and never made a legal argument or an objection. *See French*, 282 F.3d at 896 (4a).

The trial judge herself made it perfectly clear that she did not regard Mr. Jones as Respondent's counsel on the day of the disputed jury instruction. The judge had earlier that day instructed counsel to return to the courtroom at 2:00 p.m. *Id.* (5a). When the judge and the prosecutor returned at 2:00 p.m., Mr. Jones happened to be in the courtroom, so the judge then asked Mr. Jones to contact Mr. Pitts or Mr. Wilson so that they could be present. *Id.* After Mr. Jones' attempt to contact defense counsel failed, the judge announced that she would proceed without them, brought the jury in, and delivered the extemporaneous instruction. *Id.* The judge had waited *seven minutes* before bringing in the jury and proceeding without Respondent's lawyers. *Id.*

If the trial judge had believed Mr. Jones was Respondent's counsel, she would not have asked him to find Respondent's two attorneys of record. The conclusion is inescapable that the judge knew that she was proceeding without counsel and no court has found otherwise.

In fact, the judge later indicated that she understood that Respondent had only two lawyers. When Respondent moved for a new trial because of the absence of counsel, the prosecutor argued that Respondent had counsel present in the person of Mr. Jones. *See People v. French*, No. 186834 (37a) (recounting prosecutor's argument). After Mr. Pitts responded by pointing out that Mr. Jones had not made an appearance, was not admitted to practice in Michigan, had not been admitted to practice in Michigan, and had never questioned a witness, the court stated that the only ground for new trial having "some merit" is "the actual representation of Mr. French by *either* of his lawyers." *Id.* (38a) (emphasis added).

If the judge, who sat through the entire trial, thought that Mr. Jones was serving as Respondent's counsel, she would not have concluded that Respondent's Sixth Amendment argument had "some merit." Nor would she have referred to the issue as involving "the actual representation of Mr. French by *either* of his lawyers."

While the trial court might have thought that Ty Jones was an attorney from California, there is no indication in this record that the court was misled into believing that Mr. Jones was serving as Respondent's counsel. On the contrary, the record shows that the court understood that Mr. Jones was serving only as a "gofer" but, after waiting only seven minutes for counsel to appear, elected to go ahead without counsel. Therefore, even if there was a constitutional distinction between absences attributable to the court and absences attributable to defense counsel, this case would still fall into the former category.

C. The Sixth Circuit applied the correct standard of review.

In its third question, Petitioner complains that the Sixth Circuit was insufficiently deferential to the Michigan Court of Appeals. On the contrary, the Sixth Circuit clearly set forth and applied the standard of review set forth in the Antiterrorism and Effective Death Penalty Act of 1996, as interpreted by this Court in *Williams v. Taylor*, 529 U.S. 362 (2000). *See French*, 282 F.3d at 897-898 (6a-8a) (discussing AEDPA and *Williams*), 901 (12a) (finding Michigan courts "unreasonably applied harmless error analysis to French's deprivation of counsel").

Petitioner's third question is not presented as the Sixth Circuit correctly applied the standards of AEDPA to this case.

CONCLUSION

Therefore, Respondent Oliver French, Jr., respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: _____

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Dated: April 23, 2002

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

OLIVER FRENCH, JR.,

Petitioner,

Civil No. 98-CV- 74520-DT
HONORABLE ARTHUR J. TARNOW
UNITED STATES DISTRICT JUDGE

KURT JONES,

Respondent,

_____/

OPINION AND ORDER GRANTING PETITION FOR WRIT OF HABEAS CORPUS[1]

Oliver French, Jr. (petitioner"), presently confined at the Carson City Regional Facility in Carson City, Michigan, seeks the issuance of a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In his application, filed by David A. Moran of the Michigan State Appellate Defender's Office, petitioner challenges his conviction by a jury in the Detroit Recorder's Court before the Honorable Margie R. Braxton of one count of first degree murder, M.C.L. 750.316; M.S.A. 28.548, one count of second degree murder, M.C.L. 750.317; M.S.A. 28.549, two counts of assault with intent to commit murder, M.C.L. 750.83; M.S.A. 28.278, and possession of a firearm in the commission of a felony. M.C.L. 750.227b; M.S.A. 28.424 (2). For the reasons stated below, petitioner's application for writ of habeas corpus is **GRANTED**.

I. BACKGROUND

The underlying facts of the crimes are not in dispute by the parties. On September 10, 1994, petitioner, a committeeman with the United Auto Workers Maintenance and Construction Unit

[1]Staff Attorney Daniel Besser provided quality research assistance.

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(hereinafter "the Unit") at the Ford Rouge Complex in Dearborn, Michigan, arrived at the Unit's trailer for a Saturday morning meeting with the Unit's leadership. During the meeting, petitioner pulled out a firearm and shot four of the Unit's officers, killing two men and wounding the other two. Petitioner's defense at trial was insanity, based upon the testimony of a psychologist and psychiatrist that petitioner was legally insane at the time of the shooting because he suffered from a psychotic stress disorder and had also experienced an adverse reaction to hypertension medication that he was taking at the time of the offense. The prosecution presented the testimony of two psychologists, who each testified that petitioner was legally sane at the time of the commission of the offense. The trial lasted fourteen days.

After the conclusion of the testimony, the jury began its deliberations on the afternoon of April 27, 1995 although the jury limited itself to choosing a foreperson before being dismissed by the trial court for the day. On April 28, 1995, the jury began deliberating around 9:15 a.m. At 2:58 p.m., the jury sent out the first of three notes to the trial court indicating that it was deadlocked in its deliberations. The first note stated: "We can't reach a unanimous decision. Our minds are set". The jury was brought into the courtroom, where the trial court judge acknowledged receiving the note, but indicated that the deliberations would be adjourned for the weekend.

On the morning of May 1, 1995, the trial court, outside of the jury's presence, informed the prosecution and defense counsel that it would read the deadlocked jury instruction to the jury because the court felt that the jury had not deliberated long enough. Defense counsel objected to the giving of the instruction, arguing that, in light of the definitive nature of the note, in which the jurors indicated that their minds were "set", the giving of such an instruction would be coercive. The trial court, however, instructed the jury to continue to deliberate.

The jury continued to deliberate until 3:20 p.m. that day, when it sent out a second note indicating that it was deadlocked. The second note stated: " We have followed your instructions. We are still unable to reach a decision." The trial court excused the jury for the remainder of the day.

On the morning of May 2, 1995, the trial court instructed the jury a second time to continue to deliberate. However, at 11:00 a.m., the jury sent out a third note asserting that it was still deadlocked. The third note stated: "We are not able to reach a verdict. We are not going to a [sic] reach a verdict." (emphasis original). After lunch, the trial court took up the third note from the jury with the prosecutor present, but with defense counsel absent. The trial court gave the following instruction to the jury:

> I trust you had a good lunch. I did too. We received your note that stated: "We are not able to reach a verdict. We are not underlined going a [sic] reach a verdict."
>
> That was approximately 11:00 o'clock this morning. Then we sent you to lunch to give you an opportunity to just kind of toss it around individually in your minds, and then we got you back this afternoon after lunch.
>
> Now, ladies and gentlemen, I must remind you that you did take an oath to render a true and just verdict. But if you are expected to render a verdict, you must communicate, and you must talk with each other.
>
> This case lasted how many days, Mr. Hutting [the prosecutor]? Approximately 16 days?
>
> MR. HUTTING: Fourteen days trial. For jury selection–
>
> THE COURT: All right. So it wouldn't be uncommon for deliberations to go on for some time, and I might remind you that you began to deliberate I think Friday, and I don't know how you can come to the conclusion that you are not going to reach a verdict.
>
> Based upon your oath that you would reach a true and just verdict, we expect you to communicate. As I stated before, exchange ideas. Give your views. Give your opinions and try to come to a verdict, it at all possible.

> But if you don't communicate, you know that you can't reach a verdict. And when you took the oath, that was one of the promises that you made by raising your hand taking the oath, that you would deliberate upon a verdict, to try to reach a verdict. And we told you at the outset that it would not be an easy task, but we know that you can rise to the occasion.
>
> So we'll ask that you return to the jury room. Thank you.

On May 3, 1995, defense counsel (Cornelius Pitts) moved for a mistrial, arguing that the jury's three notes definitively expressed that it could not reach a verdict. At the time he moved for a mistrial, Mr. Pitts was apparently unaware that his co-counsel (Monsey Wilson) had not been present when the jury was re-instructed. Shortly after the trial court denied the motion for mistrial, the jury returned with a verdict, finding petitioner guilty but mentally ill on the counts for which he was convicted.

Prior to sentencing, petitioner moved for a new trial on the basis that he was deprived of his Sixth Amendment right to counsel when the court instructed the jury, in defense counsel's absence, after receiving the third note from the jury being deadlocked. Petitioner also contended that the instruction given by the trial court was coercive.

Petitioner's motion for a new trial was argued on the day of sentencing. The prosecutor argued that, while neither Mr. Pitts or Mr. Wilson had been present when the trial court re-instructed the jury after receiving the third note indicating that they were deadlocked, he was certain that a Mr. Ty Jones had been present. Defense counsel responded that Mr. Jones was merely an investigator assisting counsel, that he was licensed to practice only in California, that he had never filed an appearance in this case, and had never addressed the court or questioned any witnesses. In addressing the motion for a new trial, the trial court noted:

This Court feels that the issue that has been brought up by Mr. Pitts as to the actual

representation of Mr. French by either of his lawyers is one that has some merit.

However, at this time, this Court is prepared to go ahead with the sentencing, and I would deal with that issue as to the non-representation by counsel of Mr. French at a period that this Court will concede would be a critical stage in these proceedings.

The trial court, however, never explicitly addressed the issue of the absence of counsel, instead issuing a form order denying the motion for a new trial. *People v. Oliver French, Jr.*, Detroit Recorder's Court Docket # 94-010499, Order dated May 18, 1995.

Petitioner appealed his conviction to the Michigan Court of Appeals. Although the Michigan Court of Appeals found that defense counsel had not been present when the jury was re-instructed by the trial court and that a violation of petitioner's Sixth Amendment right to counsel had occurred, *People v. Oliver French, Jr.*, Michigan Court of Appeals Docket # 186834, pp. 4, 6, the Michigan Court of Appeals determined that automatic reversal of petitioner's conviction was not required and affirmed the conviction. The Michigan Supreme Court subsequently denied petitioner's application for leave to appeal on September 22, 1998. *People v. Oliver French, Jr.*, 584 N. W. 2d 924 (1998).

Petitioner has now filed an application for a writ of habeas corpus. Because this Court is granting the writ, it will limit its discussion solely to the following issue:

DID THE RE-INSTRUCTION OF THE DEADLOCKED JURY, IN THE ABSENCE OF PETITIONER'S COUNSEL, VIOLATE PETITIONER'S RIGHT TO THE ASSISTANCE OF COUNSEL AT A CRITICAL STAGE OF THE PROCEEDINGS, ENTITLING HIM TO THE ISSUANCE OF A WRIT OF HABEAS CORPUS?

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II. STANDARD OF REVIEW

Review of a state court's decision under 28 U.S.C. §2254 is governed by the standards established by the Antiterrorism and Effective Death Penalty Act (hereinafter AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996). The Act altered the standard of review that a federal court must use for writs of habeas corpus. 28 U.S.C. §2254(d) provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. §2254(d); *Harpster v. State of Ohio*, 128 F. 3d 322, 326 (6th Cir. 1997); *cert den* 118 S. Ct. 1044; 140 L. Ed. 2d 1019 (1998).

A federal court must apply the presumption of correctness to state court findings of fact for habeas corpus purposes unless convincing evidence is offered to rebut this presumption. *Warren v. Smith*, 161 F. 3d 358, 360-361 (6th Cir. 1998); 28 U.S.C. 2254 (e) (1).

The United States Court of Appeals for the Sixth Circuit only recently adopted its own standard of review for habeas cases. In *Nevers v. Killinger*, - - -F. 3d.- - - 1999 WL 97993 (6th Cir. 1999), the United States Court of Appeals for the Sixth Circuit indicated that the deference to the state courts' judgments required under the AEDPA would be achieved by adopting the rule that the unreasonableness of a state court's application of clearly established Supreme Court precedent will not be debatable among reasonable jurists if it is so offensive to existing precedent, so devoid

of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes. This new standard of review is an amalgam of the Fifth Circuit's standard of review, *Drinkard v. Johnson*, 97 F. 3d 751, 769 (5th Cir. 1996); *cert. den.* 520 U.S. 1107; 117 S. Ct. 1114; 137 L. Ed. 2d 315 (1997), and the First Circuit's standard of review. *O'Brien v. DuBois*, 145 F. 3d 16, 25 (1st. Cir. 1998).

III. DISCUSSION

A. The Michigan courts' finding that counsel was absent during the re-instruction of jury is entitled to the presumption of correctness.

Respondent's position throughout the state court appellate process and now before this Court is that petitioner was not deprived of the assistance of counsel when the trial court re-instructed the jury because Mr. Ty Jones was present for the re-instruction of the jury. However, the trial court, in addressing petitioner's motion for a new trial, indicated that the issue of non-representation had some merit and further conceded that this would be a critical stage in the proceedings. On appeal, the Michigan Court of Appeals found that the jury was re-instructed by the trial court at a time when the prosecutor was present but defense counsel was not. *People v. Oliver French, Jr., supra* at 4. The Court of Appeals also acknowledged that there was a violation of petitioner's Sixth Amendment right to counsel, *People v. Oliver French, Jr.*, at 6, although the Court declined to reverse petitioner's conviction.

A federal court must apply the presumption of correctness to state court findings of fact for habeas corpus purposes unless convincing evidence is offered to rebut this presumption. *Warren v. Smith*, 161 F. 3d 358, 360-361 (6th Cir. 1998); 28 U.S.C. 2254 (e) (1). A state appellate court's findings of fact are also entitled to the presumption of correctness. *Martin v. Rose*, 744

F. 2d 1245,1252 (6th Cir. 1984); *Smith v. Perini*, 723 F. 2d 478, 480 (6th Cir. 1983); *cert. den.* 466 U.S. 941; 104 S. Ct. 1920; 80 L. Ed. 2d 466 (1984). Cases decided after the passage of the AEDPA have also applied the presumption of correctness to state appellate court findings of fact. *Bocian v. Godinez*, 101 F. 3d 465, 467 (7th Cir. 1996); *Bowles v. Berge*, 999 F. Supp. 1247 (E.D. Wis. 1998). Additionally, when the record is ambiguous, a state appellate court's factual findings are deemed to be fairly supported by the record, and thus presumed correct, when later challenged in federal habeas corpus proceedings. *Palmer v. Estelle*, 985 F. 2d 456, 459 (9th Cir. 1993); *cert. den.* 509 U.S. 928; 113 S. Ct. 3051; 125 L. Ed. 2d 735 (1993). Finally, the presumption of correctness accorded by a federal habeas court to factual findings of a state court applies not only to a state court's express factual findings, but also to the implicit resolution of disputes that can fairly be inferred from the state record. *Armstrong v. Young*, 34 F. 3d 421, 426 (7th Cir. 1994); *cert. den.* 514 U.S. 1021; 115 S. Ct. 1369; 131 L. Ed. 2d 224 (1995)(cites omitted).

In the present case, respondent has not offered any clear and convincing evidence to this Court to overturn the presumption that the Michigan Court of Appeals' finding that defense counsel was absent during the re-instruction of the jury was incorrect. Although at the beginning of trial, petitioner's attorney (Mr. Pitts) introduced Mr. Ty Jones as an attorney from California who was "temporarily" assisting with the defense, there is no indication from the record that Mr. Jones was ever admitted to practice *pro hac vice* in Michigan by the trial court, as provided in Rule 15, § 2 of Rules Concerning the Michigan State Bar, nor did Mr. Jones ever question any witnesses, make any objections, or even place an appearance on the record. Indeed, when the jury was re-instructed by the trial court, there was no appearance placed on the record by anyone purporting to represent petitioner, and, while the trial court specifically addressed the prosecutor, she never spoke to anyone

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representing petitioner, nor were any contemporaneous objections to this instruction made by anyone representing petitioner, even though petitioner's attorney (Cornelius Pitts) had objected to a similar deadlocked jury instruction being given after the first note was received from the jury indicating that they were deadlocked. In light of the record presented from the state trial court concerning the re-instruction of the jury by the trial court, there is no evidence to show that Mr. Jones or anyone else was present on behalf of petitioner at that critical stage in the proceedings. Respondent has not presented any convincing evidence that the Michigan Court of Appeals' determination that counsel was not present when the jury was re-instructed should not be entitled to the presumption of correctness.

Respondent additionally contended at oral argument that the Michigan Court of Appeals never explicitly found that counsel was not present when the jury was re-instructed by the trial court. This contention is without merit. On page 4 of the opinion, the Michigan Court of Appeals stated that the court took up the jury's third note about being deadlocked "at a time when the prosecutor was present but defense counsel were not." This is an explicit finding that counsel was not present. Moreover, on page 6 of the opinion, the Michigan Court of Appeals concluded that petitioner's Sixth Amendment right to counsel had been violated. Even if this were not an express factual finding that counsel was absent for the re-instruction of the jury, the Court of Appeals' finding that the Sixth Amendment right to counsel was violated was clearly an "implicit resolution of disputes that can fairly be inferred from the state record and would therefore be entitled as well to the presumption of correctness". *Armstrong v. Young*, 34 F. at 426.

This Court also notes that respondent conceded at oral argument conducted in this case that no one from the Wayne County Prosecutor's office showed up for oral argument at the Michigan

Court of Appeals, to amplify or correct the state trial court record. Respondent also acknowledged that the prosecutor never filed an application for leave to appeal as cross-appellant with the Michigan Supreme Court, as allowed under M.C.R. 7.302 (D)(2). Nor did respondent move for a rehearing in the Michigan Court of Appeals pursuant to M.C.R. 7.215 (G)(1). Federal courts have held that, where a habeas petitioner did not challenge the facts set forth in the state appellate court's opinion affirming the conviction and sentence, the federal habeas court would presume the facts correct for purposes of reviewing the habeas petition. *United States ex. rel. Frierson v. Gramley*, 952 F. Supp. 578, 581 (N.D. Ill. 1997). Because the State of Michigan never challenged the Michigan Court of Appeals' findings of fact either by way of a motion for rehearing in the Michigan Court of Appeals or by an application for leave to appeal as cross-appellant in the Michigan Supreme Court, this Court will presume that the Michigan Court of Appeals' finding that petitioner's counsel was absent during the re-instruction of the jury was a correct determination.

B. The Michigan Court of Appeals' holding that the absence of counsel at a critical stage of the proceedings did not entitle Petitioner to automatic reversal of his conviction is contrary to, or an unreasonable application of, current federal law as determined by the United States Supreme Court.

The Michigan Court of Appeals' determination that petitioner was not entitled to the automatic reversal of his conviction because of the absence of his counsel during the re-instruction of the jury is contrary to, or an unreasonable application of, current Federal law as determined by the United States Supreme Court. Petitioner is therefore entitled to the issuance of a writ of habeas corpus.

The Sixth Amendment right to the assistance of counsel is made obligatory upon the states by the Due Process clause of the 14th Amendment. *Gideon v. Wainwright*, 372 U.S. 335, 342-344;

83 S. Ct. 792; 9 L. Ed. 2d 799 (1963). The presumption that counsel's assistance is essential requires a court to conclude that a trial is unfair if the accused is denied counsel at a critical stage of the trial. *United States v. Cronic*, 466 U.S. 648, 659; 104 S. Ct. 2039; 80 L. Ed. 2d. (1984); *See also Penson v. Ohio*, 488 U.S. 75, 88; 109 S. Ct. 346; 102 L. Ed. 2d 300 (1988). The United States Supreme Court has routinely found constitutional error without any specific showing of prejudice to a defendant when counsel is either totally absent, or prevented from assisting the accused during a critical stage of the proceedings. *United States v. Cronic*, 466 U.S. at 659, fn.25; *United States v. Minsky*, 963 F. 2d 870, 874 (6th Cir. 1992). The existence of certain structural defects in a trial, such as the deprivation of the right to counsel, requires automatic reversal of the conviction because it infects the entire trial process. *Brecht v. Abrahamson*, 507 U.S. 619, 629-630; 113 S. Ct. 1710; 123 L. Ed. 2d 353 (1993). In certain Sixth Amendment contexts, prejudice from the deprivation of counsel is so likely that a case-by-case inquiry into prejudice is not worth the cost. *Strickland v. Washington*, 466 U.S. 668, 692; 104 S. Ct. 2052; 80 L. Ed. 2d 674 (1984). Other cases have also held that reversal of a criminal conviction is automatic whenever a defendant is deprived of the assistance of counsel during a critical stage of the proceedings, particularly in the prosecution of a capital offense. *Holloway v. Arkansas*, 435 U.S. 475, 489; 98 S. Ct. 1173; 55 L. Ed. 2d 426 (1978).

Numerous courts have applied the automatic reversal standard in cases where a criminal defendant was deprived of the assistance of counsel at a critical stage. *See Green v. Arn*, 809 F. 2d 1257, 1263 (6th Cir. 1987); rem oth gds, 488 U.S. 1034; 109 S. Ct. 847; 102 L. Ed. 2d 979 (1989) reaffirmed 839 F2d 300 (1988)(*Cronic* rule of automatic reversal applies when counsel is absent during the taking of evidence); *United States v. Minsky*, 963 F. 2d at 874 (reversal

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automatic when counsel excluded from a sidebar conference); and *Carter v. Sowders*, 5 F 3d 975, 979 (6th Cir. 1993) (reversal automatic when counsel absent from a pre-trial deposition). These cases clearly show that the automatic reversal rule enunciated by the United Supreme Court in *Cronic* has been consistently applied in various situations where a criminal defendant was deprived of the assistance of counsel at a critical stage in the proceedings. Additionally, although a harmless error standard of review is appropriate in some instances where counsel is absent, there are some stages in the trial where the deprivation, by its very nature, cannot be deemed harmless. *Green v. Arn*, 809 F. 2d at 1263; (citing *Rushen v. Spain*, 464 U.S. 114, 117 fn. 2; 104 S. Ct. 453, 455 78 L. Ed. 2d 267 (1983)).

Jury deliberations and the return of a jury verdict constitute critical stages of criminal proceedings for purposes of the Sixth Amendment. *Siverson v. O'Leary*, 764 F. 2d 1208, 1214 (7th Cir. 1985); *United States v. Smith*, 411 F. 2d 733, 736 (6th Cir. 1969). Courts have indicated that a harmless error standard may be appropriate where a jury verdict is accepted in the absence of counsel. *United States v. Osterbrock*, 891 F. 2d 1216, 1218 (6th Cir. 1989); *See also Siverson v. O'Leary*, 764 F. 2d at 1217. However, the giving of additional jury instructions from a judge to a jury, without notifying a defendant or his or her counsel, is not deemed harmless error. *Rushen v. Spain*, 464 U.S. at 119, fn. 4 (quoting *Rogers v. United States*, 422 U.S. 35, 38-40; 95 S. Ct. 2091; 2094-2095; 45 L. Ed. 2d 1 (1975)).

In *Curtis v. Duvall*, 124 F. 3d 1 (1st Cir. 1997), the United States Court of Appeals for the First Circuit was confronted with the same situation that is before this Court, namely, giving of supplemental instructions to the jury without trial counsel being present. The First Circuit Court of Appeals found that the giving of a *sua sponte* jury instruction without consulting with, and in the

absence of defense counsel, denied the defendant the assistance of counsel at a critical stage of the proceedings. Although the deprivation was of short duration, the Court of Appeals determined that it occurred during "a vital point in the trial and was, within its limits, total." *Curtis*, at 4-5. The Court in *Curtis* declined to grant habeas relief to the petitioner solely because his conviction had become final in 1983, one year before *Cronic* was decided. *Id.* at 6. However, the First Circuit indicated that, if it were to apply *Cronic* and its progeny, reversal would be required. *Id.*

The sole difference between petitioner and the defendant in *Curtis* redounds to the benefit of petitioner, namely, the fact that his conviction occurred in state court eleven years after the ruling in *United States v. Cronic*, seven years after the United States Supreme Court re-affirmed this principle in *Penson v. Ohio*, and two years after the United States Supreme Court reaffirmed the principle that the absence of counsel requires automatic reversal in *Brecht v. Abrahamson*. At the time of petitioner's conviction, the clearly established federal law, as determined by the United States Supreme Court, was that the denial or absence of counsel at a critical stage in the criminal proceedings entitled a defendant to automatic reversal of the conviction, without any further inquiry to determine prejudice. Moreover, the United States Supreme Court had clearly indicated that the giving of additional instructions by a judge to a jury in the absence of counsel would not be considered harmless error. *Rushen v. Spain*, 464 U.S. at 119, n. 4; *Rogers v. United States*, 422 U.S. at 38-40. The Michigan Court of Appeals' determination that petitioner was not entitled to the automatic reversal of his conviction where counsel was absent when the jury was re-instructed by the trial court judge was contrary to, or an unreasonable application of, clearly established federal law as determined by the United States Supreme Court. As such, petitioner has established that he is entitled to the issuance of a writ of habeas corpus.

The cases cited by respondent do not support her position that the decision by the Michigan Court of Appeals was reasonable. In the *Rushen* case, the United States Supreme Court merely held that an unrecorded *ex parte* communication between a judge and a juror can be harmless error. As already indicated by this Court, the Supreme Court in *Rushen* also stated that it would not be harmless error for a trial court judge to give supplemental instructions to a jury in the absence of counsel.

The case of *Vines v. United States*, 28 F. 3d 1123, 1127-1128 (7th Cir. 1994), which respondent brought to this Court's attention at oral argument, merely states that a defendant is not entitled to a presumption of prejudice based upon a brief absence of counsel during one day of the trial *where it does not occur at a critical stage of the trial. Id.* at 1128 (emphasis added). The *Vines* court merely reasserted the principle enunciated in *Cronic* and noted that, to establish the presumption of prejudice from counsel's absence for a brief period during trial, a defendant must also establish that counsel was denied at a critical stage in the proceedings. The *Vines* court concluded that the defendant was not deprived of the assistance of counsel when the defense attorney was absent during a period of the trial where evidence was being presented against the co-defendants.

By contrast, petitioner here has clearly established that he was deprived of the right to the assistance of counsel during a critical stage of the trial, namely, the trial court's re-instruction of a jury that had on three separate occasions indicated to the court that it was hopelessly deadlocked. Although this "deprivation was short-lived, it occurred during a vital point in the trial and was, within its terms, total." *Curtis v. Duvall*, 124 F. 3d at 4-5. Because petitioner was deprived of the assistance of counsel during a critical stage of the proceedings, reversal of his conviction is

automatic. The Michigan Court of Appeals' failure to apply *Cronic* or its progeny, let alone to mention any of these cases in its holding, was an unreasonable application of clearly established federal law. Petitioner is therefore entitled to the issuance of a writ of habeas corpus.

Although automatic reversal of petitioner's conviction is required because he was deprived of the assistance of counsel during a critical stage of the proceedings in the state court, this Court also agrees with petitioner that he would be entitled to the issuance of a writ of habeas corpus because the Michigan Court of Appeals did not even apply a harmless error analysis in determining whether the same result in this case would have been reached had counsel been present during the re-instruction of the jury. Before a federal constitutional error which is not a structural error can be held harmless beyond a reasonable doubt, the reviewing court must be able to declare a belief that the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24; 87 S. Ct. 824; 17 L. Ed. 2d 705 (1967). Another judge in the Eastern District of Michigan has concluded that the AEDPA, if applied, would not preclude federal habeas relief where a state court failed to apply the *Chapman* harmless error standard. *Barker v. Yukins*, 993 F. Supp. 592, 602-603 fn. 7 (E.D. Mich. 1998)(Rosen, J.); citing *Jeffries v. Wood*, 114 F. 3d 1484, 1500-1501 (9th Cir. 1997).

Subsequently, the United States Court of Appeals for the Sixth Circuit, in affirming the granting of a writ of habeas corpus in another case, did so in part based on its conclusion that the Michigan Supreme Court's application of the *Chapman* harmless error standard to the particular facts in that case was not reasonable. *Nevers v. Killinger*,---F. 3d---1999 WL 97993, Slip Opinion at 22 (6th Cir. 1999).

As petitioner notes, the Michigan Court of Appeals never applied the *Chapman* harmless

error analysis in determining whether trial counsel's absence was harmless beyond a reasonable doubt. Instead, the Michigan Court of Appeals simply analyzed the trial court's instruction and determined that it was not unduly coercive. Even if the error complained of by petitioner was subject to a harmless error analysis, this Court would still grant the writ based upon the Michigan Court of Appeals' failure to employ the *Chapman* harmless error standard in determining whether reversal was required. Nonetheless, because petitioner was deprived of the assistance of counsel during a critical stage in the proceedings, reversal of his conviction is automatic, and a harmless error standard would simply be inapplicable.

IV. CONCLUSION

Because petitioner was deprived of the assistance of counsel during a critical stage in his state criminal trial, reversal of his conviction is automatic. The Michigan Court of Appeals' failure to automatically reverse petitioner's conviction was based upon an unreasonable application of clearly established federal law. Petitioner is entitled to the issuance of a writ of habeas corpus. Because this Court is granting petitioner the writ based upon counsel's absence during a critical stage of the criminal proceedings, this Court concludes that it is unnecessary to determine whether the jury instruction given by the trial judge in the absence of counsel was unduly coercive.

V. ORDER

IT IS HEREBY ORDERED THAT PETITIONER'S APPLICATION FOR WRIT OF HABEAS CORPUS IS CONDITIONALLY GRANTED. UNLESS THE STATE TAKES ACTION TO AFFORD PETITIONER A NEW TRIAL WITHIN NINETY (90) DAYS OF THE DATE OF THIS OPINION, HE MAY APPLY FOR A WRIT ORDERING RESPONDENT TO RELEASE HER FROM CUSTODY FORTHWITH.

ARTHUR J. TARNOW

HONORABLE ARTHUR J. TARNOW
UNITED STATES DISTRICT JUDGE

Dated: MAR 25 1998

A TRUE COPY
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
BY CRichard
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FILED
JUL 1 8 2000
LEONARD GREEN, Clerk

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 99-1436

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OLIVER FRENCH, JR.,	)	
	)	ON APPEAL FROM THE
Petitioner-Appellee,	)	UNITED STATES DISTRICT
	)	COURT FOR THE EASTERN
v.	)	DISTRICT OF MICHIGAN
	)	
KURT JONES,	)	OPINION
	)	
Respondent-Appellant.	)	

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
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Before: NORRIS, MOORE, and COLE, Circuit Judges.

R. GUY COLE, JR., Circuit Judge. Respondent-Appellant Kurt Jones ("the Warden") appeals the district court's issuance of Petitioner-Appellee Oliver French's writ of habeas corpus pursuant to 28 U.S.C. § 2254. *See French v. Jones*, 41 F. Supp. 2d 726 (E.D. Mich. 1999). The district court issued the habeas writ on the basis that the Michigan trial court conducted a critical stage in French's trial while his counsel was absent. *See id.* at 735; *United States v. Cronic*, 466 U.S. 648, 659 (1984). Because the record before us fails to clarify a fact central to the determination of whether the adjudication of French's claim by the Michigan state courts "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," *see* 28 U.S.C. § 2254(d)(1), we VACATE the ruling of the district court and REMAND the case to the district court for an evidentiary hearing and findings consistent with this opinion.

I. FACTS AND PROCEDURAL BACKGROUND

We recount only the facts essential to our disposition of this appeal. French was tried by a jury and found guilty but mentally ill of one count of first-degree murder, Mich. Comp. Laws. § 750.316, one count of second-degree murder, *id.* § 750.317, two counts of assault with intent to commit murder, *id.* § 750.83, and one count of possession of a firearm during the commission of a felony, *id.* § 750.227b. French was sentenced to life imprisonment without parole for the first-degree murder conviction, fifteen to thirty years' imprisonment for the each of the second-degree murder and assault with intent to murder convictions, and two years' consecutive imprisonment for the firearm conviction. At trial, French was represented by at least two attorneys, Cornelius Pitts and Monsey Wilson. Ty Jones, an attorney from California, was also present at defense counsel's table for at least portions of the trial; the precise role Jones played is at issue in this case and, as we discuss further below, remains unresolved.

During its deliberations, the jury sent three separate notes to the trial judge over the course of several days, each time indicating that it was unable to reach a verdict. After the judge received the first note, Pitts moved for a mistrial. The judge denied the motion and instructed the jury to continue deliberating. The judge again instructed the jury to continue deliberating after receiving the second note. After receiving the third note, the trial judge gave a third instruction to the jury (the "supplemental instruction"). The parties agree that, at the time of this supplemental instruction, Pitts and Wilson were absent, but Jones and French were present. While giving the supplemental

instruction, the trial judge asked the prosecutor how long the case had lasted; the prosecutor responded, "Fourteen days trial. For jury selection --." Jones said nothing.

The day after the supplemental instruction, Pitts moved for a mistrial on the basis that, in light of the three jury notes, the court's decision to permit the jury to continue deliberating "border[ed] . . . upon a situation where we are forcing someone to do something against their will." Immediately after the judge denied the motion, the jury came back with its guilty verdict. French moved for a new trial, and Pitts argued the motion on the day of sentencing. Pitts asked the court for an evidentiary hearing regarding what had occurred at the time of the court's supplemental jury instruction and argued that French had been prejudiced because defense counsel had not had the opportunity to object to the court's instruction to the jury or to respond to the question the judge put to the prosecutor regarding the length of the trial. The prosecutor responded that although Pitts and Wilson were indeed absent during the interchange following the third note, Ty Jones had been present, and that Jones had been acting as co-counsel throughout the trial. After the exchange, the judge indicated that Pitts's argument had "some merit," but that she would consider it at a later time and proceed with the sentencing forthwith:

> This Court feels that the issue that has been brought up by Mr. Pitts as to the actual representation of Mr. French by either of his lawyers is one that has some merit. However, at this time this Court is prepared to go ahead with the sentencing, and I would deal with that issue as to the none [sic] representation by counsel of Mr. French at a period that this Court will concede would be a critical stage in these proceedings.

The court never addressed Pitts's argument further, but did issue a form order overruling French's motion for a new trial.

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French v. Jones

On direct appeal to the Michigan Court of Appeals, French argued that his Sixth Amendment right to counsel had been violated because the trial court had delivered the supplemental instruction in the absence of defense counsel. *See People v. French*, No. 186834, at 1 (Mich. Ct. App. July 15, 1997). In addressing French's claim, the Michigan Court of Appeals stated in its recitation of the facts that the trial court had addressed the jury's third note and given its supplemental instruction "at a time when the prosecutor was present but defense counsel were not." *Id.* at 4. In its analysis of French's Sixth Amendment claim, the court acknowledged the rule of *Cronic* -- that a court must find "constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding," *id.* at 6 (citing *Cronic*, 466 U.S. at 659 n.25) -- and noted that "[c]ommunications with a deliberating jury outside the presence of the counsel are prohibited." *Id.* (citation omitted). The court went on, however, to find that there is no presumption of prejudice if the communication with the jury is simply an "administrative communication" such as an "instruction[] that encourage[s] a jury to continue its deliberations." *Id.* The court concluded that "while defendant's Sixth Amendment right was violated, reversal is not required." *Id.* The Michigan Supreme Court denied French's application for leave to appeal. *See People v. French*, 584 N.W.2d 924 (1998).

French filed a petition for a writ of habeas corpus in the district court in October 1998. In the petition, French argued that he was entitled to the writ because the trial court had conducted a

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critical stage of the proceeding against him in the absence of defense counsel.[1] The district court heard argument on the petition on March 17, 1999. Neither party moved for an evidentiary hearing in the district court, and none was held. The court conditionally granted the writ on March 25, 1999. *See French*, 41 F. Supp. 2d at 735. The Warden filed a timely notice of appeal.

II. DISCUSSION

A.

The Warden first argues that Jones was representing French as his attorney at the time of the supplemental jury instruction. Because the parties agree that Jones was present and that Pitts and Wilson were absent at the time of the instruction, the key issue here is the precise role Jones played in French's defense. Because the record fails to clarify Jones's role, we are constrained to remand the case to the district court for an evidentiary hearing and further findings of fact and conclusions of law.

We review the district court's grant of habeas relief de novo. *See Harpster v. Ohio*, 128 F.3d 322, 326 (6th Cir. 1997), *cert. denied*, 522 U.S. 1112 (1998). In determining whether to issue a habeas writ, the district court's review of a state court decision is governed by the standards set forth

[1]French also argued that he was entitled to the writ because the trial court's supplemental jury instruction was unconstitutionally coercive. The district court did not reach this issue because it granted the writ based upon the Sixth Amendment issue. *See French*, 41 F. Supp. 2d at 729-30. Because the district court did not reach the issue of whether the instruction was unconstitutionally coercive, we do not address it here.

in the Antiterrorism and Effective Death Penalty Act ("AEDPA").[2] *See id.* Title 28 § 2254(d) provides as follows:

> **(d)** An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). In his habeas petition, French argued that the Michigan appeals court's failure to reverse his conviction was either contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court.[3] *See* 28 U.S.C. § 2254(d)(1). The district court

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[2]We decide this case pursuant to AEDPA because French filed his petition for a writ of habeas corpus in October 1998, well after AEDPA's effective date of April 24, 1996. *See Barker v. Yukins*, 199 F.3d 867, 871 (6th Cir. 1999).

[3]The Warden argues that the district court violated § 2254(d)(2) because it issued the habeas writ based upon the Michigan Court of Appeals' statement that the trial judge had given the supplemental jury instruction in the absence of defense counsel. *See People v. French*, No. 186834, at 4. The Warden contends that the appeals court's statement is an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *See* 28 U.S.C. § 2254(d)(2). Thus, the Warden argues, issuance of the writ was barred by § 2254(d)(2).

This argument convolutes the meaning and purpose of § 2254(d)(2). Section 2254(d)(2) provides an alternative to § 2254(d)(1) and serves as a basis upon which a federal court may grant a habeas writ. *See* 28 U.S.C. § 2254(d)(1) and (2). French brought his petition under subsection (d)(1), and the district court granted the petition under that subsection. Whether the petition could or should have been granted under subsection (d)(2) has no bearing on this case, and we do not address it here.

granted the writ on that basis, under the standard set forth by this court in *Nevers v. Killinger*, 169 F.3d 352 (6th Cir.), *cert. denied*, 527 U.S. 1004 (1999). *See French*, 41 F. Supp. 2d at 730, 732. Since the date of the district court's decision, the Supreme Court has clarified the meaning of the operative clauses in § 2254(d)(1). *See Williams v. Taylor*, -- U.S. --, 120 S. Ct. 1495 (2000). Further, we have held that "*Nevers* . . . no longer correctly state[s] the law on the issue of the appropriate standard under 28 U.S.C. § 2254(d)," and that *Williams* does. *Harris v. Stovall*, 212 F.3d 940, 43 (6th Cir. 2000). In *Williams*, the Supreme Court described the appropriate application of § 2254(d) as follows:

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams, 120 S. Ct. at 1523.

The question of whether French was deprived of his right to counsel is a mixed question of law and fact. *See Strickland v. Washington*, 466 U.S. 668, 698 (1984). In a habeas case, we apply the "unreasonable application" prong of § 2254(d)(1) to a mixed question of law and fact. *See Harpster*, 128 F.3d at 327; 28 U.S.C. § 2254(d)(1). The clearly established federal law upon which both French and the district court rely is that an appeals court must reverse a criminal defendant's conviction "without any specific showing of prejudice to [the] defendant when [his] counsel is either totally absent, or prevented from assisting the accused during a critical stage of the proceedings."

French, 41 F. Supp. 2d at 732 (citing *Cronic*, 466 U.S. at 659 n.25; *United States v. Minsky*, 963 F.2d 870, 874 (6th Cir. 1992)). We agree that the Supreme Court has clearly established that the "complete denial of counsel during a critical stage of a judicial proceeding mandates a presumption of prejudice." *Roe v. Flores-Ortega*, 120 S. Ct. 1029, 1038 (2000); *Penson v. Ohio*, 488 U.S. 75, 88 (1988); *Cronic*, 466 U.S. at 659 and 659 n.25; *see also United States v. Russell*, 205 F.3d 768, 771 (5th Cir. 2000) ("*Cronic* holds that because the guiding . . . hand of counsel is essential, 'a trial is unfair if the accused is denied counsel at a *critical* stage of his trial.'") (citing *Cronic*, 466 U.S. at 658) (emphasis added in original); *Curtis v. Duval* 124 F.3d 1, 4 (1st Cir. 1997) ("*Cronic* and its progeny do indeed stand for the proposition that the actual or constructive denial of counsel at a critical stage of a criminal trial constitutes prejudice per se and thus invalidates a defendant's conviction.").[4] We also agree with the district court that the return of a supplemental jury instruction is a "critical stage" of a criminal proceeding.[5] *See Rogers v. United States*, 422 U.S. 35 (1975);

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[4]We recognize, of course, that "clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), means what it says: a federal court conducting habeas review must look to the Supreme Court case law to determine whether a petitioner is entitled to a habeas writ pursuant to § 2254(d)(1). *See Williams*, 120 S. Ct. at 1523. Thus, the state court decisions upon which the Warden relies in his brief are irrelevant to our review of the district court's decision. We note some federal appellate court decisions here only for the sake of emphasizing what the Supreme Court itself has already held.

[5]Both the Michigan trial and appeals courts appear to agree that a supplemental jury instruction is a "critical stage." The trial judge "concede[d]" that the supplemental instruction she gave occurred "at a period that this Court will concede would be a critical stage in these proceedings." Likewise, the appeals court stated that "[j]ury deliberations and the return of the verdict constitute critical stages of a criminal trial for purposes of the Sixth Amendment." *People v. French*, No. 186834, at 6 (citing *Siverson v. O'Leary*, 764 F.2d 1208, 1217 (7th Cir. 1985).

Shields v. United States, 273 U.S. 583 (1927); *see also Curtis*, 124 F.3d at 4 (stating that "recalling the jury for supplementary instructions after deliberations are underway is a critical stage of a criminal trial"). Thus, we agree with the legal principle put forth by the district court.

Despite our agreement with the district court's statement of the law, we are unable to determine whether French was truly without counsel at the time of the trial court's supplemental jury instruction. The record is altogether unclear as to whether Jones was acting as counsel to French, or was present in some other capacity.[6] The district court based its conclusion that Jones was not acting as counsel on several considerations. *See French*, 41 F. Supp. 2d at 731-32. Most salient among these considerations were the statement by the Michigan Court of Appeals that the trial court had given its supplemental jury instruction "at a time when the prosecutor was present but defense counsel were not," *People v. French*, No. 186834, at 4, and the appeals court's conclusion that "[French's] Sixth Amendment right was violated."[7] *Id.* at 6. The district court determined that these

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[6]The Warden labels as "disturbing" and "completely erroneous" the district court's finding that "there is no evidence to show that Mr. Jones or anyone else was present on behalf of petitioner" at the time of the supplemental jury instruction. *See French*, 41 F. Supp. 2d at 731. The Warden reads the district court's statement to mean that Jones was not *physically* present. It is clear from the context of the court's statement, however, that the court was indicating that neither Jones nor anyone else was present *as an attorney* for French at the time of the instruction. *See id.* Regardless, the parties agree that Jones was physically present during the instruction. Our concern on appeal is whether French was represented by counsel.

[7]The other considerations taken into account by the district court -- for instance, the facts that Jones did not file an appearance with the trial court, that he was not admitted to practice before that court, and that he made no objection at the time of the supplemental jury instruction, *see French*, 41 F. Supp. 2d at 731 -- have some persuasive effect. They do not, however, resolve on their own the question of whether Jones's presence defeats French's claim that the trial court proceeded in the

statements by the state appeals court were findings of fact, and, as such, were entitled to a presumption of correctness pursuant to § 2254(e)(1). *See French*, 41 F. Supp. 2d at 730-32. The district court erred in this analysis.

It is true that § 2254(e)(1) creates a presumption in favor of a state court's finding of fact. *See* 28 U.S.C. § 2254(e)(1). This presumption applies, for instance, to the *facts* that Pitts and Wilson were absent and that Jones was physically present during the trial court's supplemental instruction. The presumption of § 2254(e)(1) does not, however, apply to the state appeals court's *legal conclusion* that French was without defense counsel at the time of the instruction. As we noted, *supra*, the question of whether French was deprived of counsel at the time of the supplemental instruction is a mixed question of law and fact -- it requires not only an analysis of whether anyone was physically present with French at the time of the instruction, but also whether the person there was acting in the capacity of counsel. Under AEDPA, a federal court must review a state court's conclusion regarding a mixed question of law and fact pursuant to the "unreasonable application" standard set forth in § 2254(d)(1). *See Harpster*, 128 F.3d at 327.

In this case, the only way to know whether the state trial and appeals courts applied federal Sixth Amendment law in an unreasonable manner is to determine the precise nature of the role Jones played at French's trial. We simply cannot conduct any meaningful review of the state court

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complete absence of counsel.

decisions without knowing more about what Jones did at trial.[8] For this reason, we remand the case to the district court for an evidentiary hearing and further findings of fact and conclusions of law regarding the nature and scope of the role that Jones played at French's trial and at the time of the supplemental jury instruction.

B.

The Warden also argues that, even if error occurred in the trial court, such error was a "trial error" based in either defense counsel's ineffectiveness or the trial court's ex parte communication, and not a "structural error" deriving from the complete deprivation of counsel. As such, the Warden asserts, the district court erred in presuming that the absence of counsel was prejudicial and in failing to find that any error was harmless. Because our determination of what, if any, error occurred in the trial court turns on the precise nature of Jones's role at trial, we decline to address the Warden's argument at this time. We note, however, that the district court may also wish to explore further the circumstances surrounding the absence of Pitts and Wilson and the nature of the trial judge's communication with the prosecutor at the time of the supplemental jury instruction.

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[8]French argues that we may not remand for an evidentiary hearing sua sponte and that we must accept the state court findings, pursuant to § 2254(e)(1), because the Warden has failed to meet his burden under that section of proving the state court findings to be erroneous. We disagree. It is true that the factual findings of the Michigan courts which support habeas relief are presumed to be correct unless the Warden can prove by clear and convincing evidence that they are erroneous. *See* 28 U.S.C. § 2254(e)(1); *Burden v. Zant*, 498 U.S. 433, 436-37 (1991). This does not constrain us, however, from finding further facts that the state court failed to illuminate. Because we cannot complete our review under § 2254(d)(1) without knowing more about what happened at trial, an evidentiary hearing is necessary.

2 Jb

III. CONCLUSION

For the foregoing reasons, we VACATE the district court's opinion and REMAND this case to the district court for further proceedings consistent with this opinion.